No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1946

HANS MAX HAUPT, PETITIONER

v.

THE UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision and statute involved	3
Statement	4
A. Herbert's enemy status	6
B. The overt acts submitted to the jury	10
(i) Assistance to Herbert in obtaining employment	10
(ii) Harboring and sheltering Herbert	13
(iii) Purchasing an automobile for Herbert	20
C. Petitioner's knowledge of Herbert's enemy status and petitioner's intent to betray	22
Summary of argument	30
Argument:	
I. The indictment charged and the evidence established the crime of treason	45
A. The overt acts were acts which gave the enemy aid and comfort	45
B. Petitioner's treasonable intent was not nullified by his relationship to the enemy agent	53
II. All the overt acts submitted to the jury were supported by the testimony of two witnesses within the meaning of the Constitution	57
A. The two-witness requirement in English treason cases was held satisfied by evidence which required interpretation; and the two witnesses were permitted to testify to different parts of the same overt act	59
B. The debates in the Constitutional Convention show that the two-witness requirement was directed against prosecutions inspired by virulence and supported by perjury	66
C. The two-witness requirement in the Constitution is construed by the early American decisions precisely as that requirement was construed by the English courts before 1776	71

719467—46—1

Argument—Continued

II.—Continued Page

D. The testimony supporting the overt acts here fully meets the constitutional requirement. 88

(1) Overt acts 10 and 11—assisting Herbert to obtain employment. 88

(2) Overt acts 13–16—the arrangements for and purchase of the automobile for Herbert. 89

(3) Overt acts 12, 17, 20–23—harboring and sheltering Herbert. 92

III. Even if some of the overt acts should be deemed not to have been proved by two sufficient witnesses, the judgment of conviction must still be affirmed. 98

A. As a matter of the substantive law of treason, one overt act, proved by the testimony of two witnesses, is sufficient (there being also present the requisite intent) to sustain a judgment of conviction, even though additional overt acts alleged in the indictment are not so proved. 99

B. Generally, in the criminal law, a verdict stands if a single overt act has been proved, even though the others may be bad. 104

C. Since special verdicts are not generally employed in criminal cases, a contrary rule would mean that a defendant could never be charged with more than one overt act of treason except at the risk of acquittal if a single additional overt act submitted to the jury failed of proof. 110

D. The only authorities apparently to the contrary involve situations where, by misdirection of the jury, the prosecution was predicated on an unconstitutional ground or statute. 114

E. On the facts of the present case, it is wholly unreasonable to assume that the jury, consistently with its verdict and in view of the circumstance that the doing of the overt acts was not disputed, could have been misled by any insufficiency of proof as to any overt act. 123

IV. There were no errors in the admission of evidence. 130

A. The evidence tending to show petitioner's treasonable intent was properly admitted. 130

B. The evidence relative to Herbert's hostile mission was properly admitted. 149

Argument—Continued
IV.—Continued Page
C. The trial judge properly exercised his discretion to permit the prosecution to cross-examine a hostile witness 152
V. The closing arguments of government counsel involved no misconduct and were thoroughly proper and professional 152
VI. There was no error in the trial judge's instructions to the jury 155
A. The instructions given were correct 155
B. The requested instructions were properly refused 157
VII. No error occurred in connection with the deliberations of the jury 159
A. It was proper to send the indictment and charge to the jury room 159
B. It was proper to read the testimony of three witnesses to the jury at its request 160
C. The jury's deliberations were not of undue length 163
D. The jury's plea for clemency shows that its verdict did not rest on war-time passion 164
Conclusion 166

CITATIONS

Cases:
Abrams v. *United States*, 250 U. S. 616 108
Abshier v. *People*, 87 Colo. 507 151
Agnew v. *United States*, 165 U. S. 36 158
Allis v. *United States*, 155 U. S. 117 135
Armour & Co. v. *Wantock*, 323 U. S. 126 86
Lord Balmerino's Case, Foster, *Crown Law*, 9n 125
Bayard, Trial of Colonel, 14 How. St. Tr. 471 67
Bell v. *Bell*, 181 U. S. 175 118
Bennet v. *United States*, 227 U. S. 333 158
Bernal v. *United States*, 241 Fed. 339, certiorari denied, 245 U. S. 672 164
Berwick's Case, Foster *Crown Law* 10, 18 How. St. Tr. 367 63
Blaustein v. *United States*, 44 F. 2d 163, certiorari denied *sub nom. Sokol* v. *United States*, 283 U. S. 838 105
Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U. S. 800 164
Brooks v. *United States*, 267 U. S. 432 108
Burkhardt v. *United States*, 13 F. 2d 841 105
Burton v. *United States*, 202 U. S. 344 107
Capriola v. *United States*, 61 F. 2d 5 159
Carlisle v. *United States*, 16 Wall. 147 5, 49, 55
Charge to Grand Jury, 2 Curt. 630, Fed. Case No. 18269 77

Cases—Continued

	Page
Charge to Grand Jury, 4 Blatchf. 518, Fed. Case No. 18270	48
Charge to Grand Jury, 5 Blatchf. 549, Fed. Case No. 18271	48, 77
Charge to Grand Jury, 1 Pond 609, Fed. Case No. 18272	48, 49
Charge to Grand Jury, 1 Spr. 602, Fed. Case No. 18273	77
Charge to Grand Jury, 2 Wall. Jr. 134, Fed. Case No. 18276	77
Claassen v. *United States*, 142 U. S. 140	38, 107
Cohens v. *Virginia*, 6 Wheat. 264	86
Coldwell v. *United States*, 256 Fed. 805, certiorari denied, 250 U. S. 661	135
Cramer v. *United States*, 325 U. S. 1	2, 32, 33, 36, 39, 40, 41, 46, 47, 54, 55, 83, 86, 95, 103, 104, 106, 114, 120, 121, 122, 128, 130, 131, 138, 151
Culp v. *United States*, 131 F. 2d 93	164
Mr. Deacon's case, Foster, *Crown Law* 9, 18 How. St. Tr. 366	139, 143
De Jager v. *Attorney-General of Natal*, [1907] A. C. 326	5
De La Motte, Trial of, 21 How. St. Tr. 687	65
Druecker v. *Salomon*, 21 Wis. 621	77
Duffey v. *State*, 124 Neb. 23	163
Dunn v. *United States*, 284 U. S. 390	108
Eliza, The, 4 Dall. 37	153
Evans v. *United States (No. 2)*, 153 U. S. 608	107
Fries, Case of, Fed. Case No. 5126	73, 76, 145, 148
Fries, Case of, Fed. Case No. 5127	102
Garcia v. *State*, 26 Ariz. 597	163
Garst v. *United States*, 180 Fed. 339	159
Gilson v. *United States*, 258 Fed. 588, certiorari denied, 251 U. S. 555	105, 122
Glasser v. *United States*, 315 U. S. 60	107
Gompers v. *United States*, 233 U. S. 604	33, 58
Goode v. *United States*, 159 U. S. 663	108
Goods of Colman, 3 Curt. Eccl. 118	97
Green v. *State*, 122 Ga. 169	163
Haddock v. *Haddock*, 201 U. S. 562	118
Hanauer v. *Doane*, 12 Wall. 342	32, 49, 55
Havener v. *United States*, 49 F. 2d 196	106
Herman v. *United States*, 257 Fed. 601, certiorari denied, 251 U. S. 558	135
Hickory v. *United States*, 151 U. S. 303	152
Hindmarsh v. *Charlton*, 8 H. L. C. 160	97
Houstatine v. *United States*, 263 Fed. 1	135
Humphrey's Executor v. *United States*, 295 U. S. 602	86
Hyde v. *United States*, 225 U. S. 347	45, 164
Joyce v. *Director of Public Prosecutions*, [1946] A. C. 347	5, 126
Jung Quey v. *United States*, 222 Fed. 766	105
Kaplan v. *United States*, 18 F. 2d 939	105
King, The v. *Layer*, 8 Mod. 82	102

Cases—Continued

	Page
Kirchner v. *United States*, 255 Fed. 301, certiorari dismissed, 250 U. S. 678	135
Knauer v. *United States*, No. 510, Oct. T. 1945, decided June 10, 1946	135, 136, 154
Layer, Trial of, 16 How. St. Tr. 94	101, 102, 139, 141
Little v. *United States*, 73 F. 2d 861	159
Lowick, Trial of, 13 How. St. Tr. 267	60, 63, 83, 87, 101, 133
Lutins v. *State*, 142 Fla. 288	163
Mathews v. *United States*, 15 F. 2d 139	105
Mendelson v. *United States*, 58 F. 2d 532	164
Minner v. *United States*, 57 F. 2d 506	105, 122
Moore v. *State*, 131 Tex. Crim. 420	163
Murray v. *United States*, 130 F. 2d 442	159
Nash v. *United States*, 229 U. S. 373	122
Norton v. *Bazett*, D. & Sw. 259	97
Paraiso v. *United States*, 207 U. S. 368	97
Parkyns, Trial of, 13 How. St. Tr. 63	133
Peake v. *Oldham*, 1 Cowp. 275	108
People v. *Kasem*, 230 Mich. 278	163
People v. *Munday*, 293 Ill. 191, certiorari denied, 254 U. S. 638	151
Pinkerton v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946	107
Powers v. *United States*, 223 U. S. 303	108
Quirin, Ex parte, 317 U. S. 1	5, 7
Radich v. *Hutchins*, 95 F. S. 210	5
Regicides, Trial of the, 5 How. St. Tr. 947	37, 100
Respublica v. *Carlisle*, 1 Dall. 35	67
Respublica v. *Malin*, 1 Dall. 33	7, 134
Respublica v. *McCarty*, 2 Dall. 86	67, 145, 148
Respublica v. *Roberts*, 1 Dall. 39	67, 134, 145, 147
Respublica v. *Weidle*, 2 Dall. 88	67
Rex v. *Benfield*, 2 Burr. 980	108
Rex v. *Crosby*, 12 How. St. Tr. 1291	66
Rex v. *Dr. Hensey*, 1 Burr. 642, 19 How. St. Tr. 1342	65, 66
Rookwood, Trial of, 13 How. St. Tr. 139	101, 139
Schoberg v. *United States*, 264 Fed. 1, certiorari denied, 253 U. S. 494	135
Shidler v. *United States*, 257 Fed. 620	135
Short v. *United States*, 91 F. 2d 614	105
Shreve v. *United States*, 103 F. 2d 796, certiorari denied, 308 U. S. 570	106
Simons v. *United States*, 119 F. 2d 539, certiorari denied, 314 U. S. 616	105
Sprott v. *United States*, 20 Wall. 459	55
State v. *Griffin*, 218 Iowa 1301	151
State v. *Jennings*, 131 Ore. 455	163
State v. *Jester*, 46 Idaho 561	136

Cases—Continued

	Page
State v. *Logue*, 115 Kan. 391	163
Stenzel v. *United States*, 264 Fed. 161	135
Stephan v. *United States*, 133 F. 2d 87, certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423	37, 46, 55, 86, 103, 104, 106, 110, 127, 159
Stephens v. *United States*, 41 F. 2d 440, certiorari denied *sub nom. Spicer* v. *United States*, 282 U. S. 880	106
Stromberg v. *California*, 283 U. S. 359	39, 40, 41, 104, 115, 120, 127
Tacon v. *United States*, 270 Fed. 88	105
Mr. Townly's Case, Foster, *Crown Law* 7	125
United States v. *Burr*, Fed. Cas. No. 14693	3,4 35, 72, 80, 81, 83, 87, 90, 94
United States v. *Cramer*, 137 F. 2d 888	77, 104, 122
United States v. *Dilliard*, 101 F. 2d 829, certiorari denied, 306 U. S. 635	105
United States v. *Fricke*, 259 Fed. 673	48, 82, 103
United States v. *Graham*, 102 F. 2d 436, certiorari denied, 307 U. S. 643	152
United States v. *Greathouse*, 4 Sawy. 457, Fed. Case No. 15254	49, 77
United States v. *Greiner*, 4 Phila. 396, 1 Cadw. Cas. 448, Fed. Cas. No. 15262	77
United States v. *Hammond*, 226 Fed. 849, reversed on other grounds, 246 Fed. 40	163
United States v. *Haupt*, 47 F. Supp. 832	4, 103
United States v. *Haupt*, 136 F. 2d 661	4, 23, 103
United States v. *Hoxie*, 1 Paine 265, Fed. Case No. 14507	76
United States v. *Mitchell*, 2 Dall. 348	34, 78, 81, 84, 90, 94
United States v. *Orr*, 233 Fed 717	105
United States v. *Pelley*, 132 F. 2d 170, certiorari denied, 318 U. S. 764	135
United States v. *Richards*, 149 Fed. 443	105
United States v. *Robinson*, 259 Fed. 685	68, 83, 84, 85
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	107
United States v. *Trenton Potteries*, 273 U. S. 392	158
Viereck v. *United States*, 130 F. 2d 945, reversed on other grounds, 318 U. S. 236	135
Walker v. *United States*, 104 F. 2d 465	152
Sir John Wedderburn's Case, Foster, *Crown Law*, 22, 18 How. St. Tr. 425	139, 143
Willard v. *State*, 195 Wis. 170	163
Williams v. *North Carolina*, 317 U. S. 287	39, 40, 41, 104, 115, 118, 119, 120
Williamson v. *United States*, 207 U. S. 425	135
Willis, Trial of, 15 How. St. Tr. 614	145
Wood v. *United States*, 16 Pet. 342	135

United States Constitution and Statutes: Page
Constitution, Art. III, sec. 3 ..... 3, 57, 71, 144
Act of March 16, 1878, c. 37, 20 Stat. 30, 28 U. S. C. 632 71
Criminal Code, Section 1, 18 U. S. C. 1 3
Criminal Code, Section 3, 18 U. S. C. 3 23
English Statutes:
St. 1 Edw. VI, c. 12, § 22 68
St. 7 Will. III, c. 3 ..... 33, 34, 42, 59, 60, 66, 67, 68, 138, 139, 144
St. 13 Will. III, c. 3 142
Criminal Evidence Act of 1898, St. 61 and 62 Vict., c. 36 71
Miscellaneous:
1 Beveridge, *The Life of John Marshall* (1916) 357 et seq 76
4 Bl. Comm. * 356–357 67
9 *Dict. Am. Biog.*, 492 76
11 *Dict. Am. Biog.* 312–313 76
Elliott's *Debates*, vols. 3 and 4 76
2 Farrand, *Records of the Federal Convention*, 345 68
F. R. Crim P., Rule 31 ..... 38, 110
F. R. Crim. P., Rule 49 ..... 38, 111
Foster, *Crown Law:*
194 102
217 49
221 111
241–242 145
243–244 64
245 ..... 139, 143
1 Hale, *History of the Pleas of the Crown*, *122 102
2 Hawkins, *Pleas of the Crown* (4th ed. 1762):
257–259 67
436 102
Hurst, *The Historic Background of the Treason Clause of the United States Constitution* (1945) 6 Fed. Bar Ass'n J. 305 77
Hurst, *Treason in the United States* (1944) 58 Harv. L. Rev. 226 ..... 67, 70
Hurst, *Treason in the United States* (1945) 58 Harv. L. Rev. 395 75
Hurst, *Treason in the United States* (1945) 58 Harv. L. Rev. 806 ..... 76, 77, 83
Kuttner, *The Two-Witness Requirement in Canon Law* (Appendix to U. S. Brief in the *Cramer* case, pp. 42–43) 87
2 Story, *Commentaries on the Constitution* (2d ed. 1851) 540 77
2 Wigmore, *Evidence* (3d ed. 1940) § 579 71
7 Wigmore, *Evidence* (3d ed. 1940) § 2036 ..... 59, 68
7 Wigmore, *Evidence* (3d ed. 1940) § 2037 69
3 Works of James Wilson (1804):
97–105, 172, 159–161 148
99–100 75

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 49

HANS MAX HAUPT, PETITIONER

v.

THE UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 881–930) and the dissenting opinion of Judge Major on denial of the petition for rehearing (R. 951–954) are reported at 152 F. 2d 771.

JURISDICTION

The judgment of the circuit court of appeals was entered December 20, 1945 (R. 930), and a petition for rehearing (R. 930–944) was denied January 24, 1946 (R. 951). The petition for a writ of certiorari was filed February 28, 1946, and granted on May 27, 1946 (R. 957–958). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the overt acts submitted to the jury were legally sufficient acts of aid and comfort within the rule of *Cramer* v. *United States*, 325 U. S. 1.

2. Whether the overt acts submitted to the jury were each supported by the testimony of two witnesses as required by the Constitution.

3. Whether the trial judge erred in instructing the jury that petitioner could be convicted if they found that, with intent to betray, he had committed any one of the overt acts submitted for their consideration and that such act had been established by the testimony of two witnesses.

4. Whether reversal of the judgment must result from a finding of insufficiency as to any one overt act.

5. Whether the trial court properly admitted on the issue of intent evidence of (a) petitioner's pre-war statements, (b) petitioner's extra-judicial admissions, (c) one-witness testimony of overt acts withdrawn from the jury's consideration.

6. Whether the trial judge properly admitted the testimony of a convicted saboteur on the nature of the hostile mission as bearing on the enemy status of Herbert Haupt.

7. Whether the trial judge abused his discretion in permitting the Government to cross-examine a hostile witness.

8. Whether government counsel were guilty of misconduct in their closing arguments.

9. Whether the trial judge erred in permitting the jury to take a copy of the indictment and of his instructions to the jury room, and in acceding to the jury's request for the rereading of the testimony of one defense and two government witnesses.

10. Whether the jury's verdict was the result of passion and prejudice.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution, Art. III, sec. 3:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> * * * * *

Section 1 of the Criminal Code, 18 U. S. C. 1:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

STATEMENT

Petitioner was indicted (R. 1–9) in the District Court of the United States for the Northern District of Illinois, for treason.[1] The indictment alleged that from June 17, 1942, to July 17, 1942, petitioner, a person owing allegiance to the United States, unlawfully adhered to the enemies of the United States, the Government of the German Reich, with which the United States was at war. It was alleged that on June 17, 1942, Herbert Haupt, an agent of the German Reich, came to the United States and served as a secret agent, saboteur, and spy, and that petitioner, knowing of Herbert's mission, adhered to the enemy and gave it aid and comfort by maintaining and harboring Herbert; by meeting with and assisting Herbert in matters connected with Herbert's service to Germany; in his countenancing that service; in carrying out requests and instructions of Herbert in connection with that service; in purchasing an automobile for Herbert; in attempting to procure employment for Herbert; in furnishing false information regarding the identity and mission of Herbert; and in receiv-

[1] Petitioner previously had been convicted of treason and sentenced to death under another indictment which was predicated on the same acts, see *United States* v. *Haupt*, 47 F. Supp. 832, 836 (N. D. Ill.), but the conviction was reversed by the Circuit Court of Appeals for the Seventh Circuit, principally because of the applicability of the *McNabb* doctrine, 318 U. S. 332, to the case. *United States* v. *Haupt*, 136 F. 2d 661.

ing, safeguarding, and concealing property and funds of Herbert. Twenty-nine overt acts were alleged to have been committed by petitioner with the intention of adhering to the enemy and giving it aid and comfort (R. 3–9), but only twelve were submitted to the jury (see *infra*, pp. 10–21).

Petitioner was tried before a jury and was found guilty (R. 45); he was sentenced to imprisonment for the remainder of his life and to pay a fine of $10,000 (R. 52–53).[2] Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed, one judge dissenting (R. 930, 951).

Petitioner is the father of Herbert Haupt, one of the eight saboteurs convicted by a military tribunal, and who was thereafter executed. See *Ex Parte Quirin*, 317 U. S. 1. Petitioner was born in Germany in 1894;[3] he married there; and his son Herbert was born of that marriage in Germany

[2] In a memorandum opinion the trial judge stated that on the evidence adduced at the trial petitioner deserved a sentence of death, but that the life sentence was imposed in deference to a letter from the jury urging the court to be merciful to petitioner (R. 53–55; see also R. 45 and R. 847).

[3] There was no dispute at the trial that petitioner is a naturalized citizen; his naturalization certificate was received in evidence as Government Exhibit 65 (R. 439). But as a resident of the United States, he owed a temporary allegiance to this country, violation of which would have been treason, regardless of his citizenship. See *Carlisle* v. *United States*, 16 Wall. 147; *Radich* v. *Hutchins*, 95 U. S. 210; *De Jager* v. *Attorney-General of Natal*, [1907] A. C. 326 (Privy Council); *Joyce* v. *Director of Public Prosecutions*, [1946] A. C. 347 (House of Lords).

in 1919. He came to this country in 1923, his wife and son followed two years later, and thereafter they lived in or about Chicago, Illinois. (See R. 54, 87–88, 103, 882.) In the spring of 1939 the son, Herbert, obtained a job with the Simpson Optical Company in Chicago, which is engaged in the manufacture of all kinds of lenses for instruments, including parts for the Norden bombsight (R. 247–248). The evidence, which is treated in somewhat more detail below, shows that in the spring of 1941, Herbert left his home and job and went to Mexico (R. 222, 226, 234, 243, 645–651), that with the aid of the German consul in Mexico (R. 651) he went to Japan (R. 218–219, 242), and from there to Germany (R. 139, 412–41[illegible]525, 570–571), and that there he entered the employ of the German Government and was trained for sabotage work in this country (R. 107–173).

A. HERBERT'S ENEMY STATUS

The acts of treason charged against petitioner are predicated on the proposition, which was undisputed at the trial (see R. 101–102), that Herbert was an enemy agent. The Government established the enemy character of Herbert principally through the testimony of Ernest Peter Burger, one of Herbert's fellow saboteurs. Burger detailed (R. 107–173) the intensive training in sabotage that Herbert and his seven co-saboteurs re-

ceived in Germany. Essentially, his testimony revealed the facts which are set forth in this Court's opinion in *Ex parte Quirin, supra,* 317 U. S. at 20–22, and for purposes of brevity we shall not restate them here. Suffice it to say that before the eight saboteurs left Germany, they were instructed concerning their activities in this country. The general strategy was that each saboteur, after he had illicitly landed in the United States, should devote three or four months to establishing his identity. Each was to establish himself in a community and engage in the same work that he had previously been doing. (See R. 116–117, 134–135.)

Herbert's specific instructions were as follows:

1. To use his own name only in a vicinity or among people where he was known (R. 115);

2. Upon landing in the United States to proceed directly to Chicago (R. 115);

3. To procure an automobile for the use of his fellow saboteurs (R. 115); "the purpose for purchasing an automobile was to, first, remove our explosives from the place where they were caged, or hidden or buried, back to a place which in the meantime would be prepared. The second purpose for a car was to give us range for our operations" (R. 116);

4. To secure employment with the Simpson Optical Co. (R. 120, 159, 160).

5. "To procure information and details concerning the optical industry in Chicago, especially the Norden bombsight, and to furnish us [the saboteurs] information * * * in order to equip us to carry out our assignments" (R. 115). "There was only one particular name mentioned, and that was the name of the Simpson Optical Company in Chicago connected with the Norden bombsight" (R. 120).

6. To procure information "of the incendiary layout" and about "vital machines and parts" in the Simpson Optical Co., "in order to equip us to attack the different particular parts, * * * all important bottlenecks in this plant" (R. 120).

7. To register under the Selective Training and Service Act (R. 115);

8. "To contact trustworthy political people and to deposit a certain amount of money with them as a contingent fund for our groups in case of emergency" (R. 115);

Before leaving Germany the saboteurs were divided into two groups, each one taking one-half of the United States for its operations. The witness Burger was in group 1 and Herbert was in group 2 (R. 117–118). The assignment sheet of group 1 stated that that group would receive its information concerning optical industries from Herbert, even though he was a member of group 2 (R. 118), because "he happened to be the only

one who * * * was familiar with optical matters" (R. 119–120).

The saboteur group was fully equipped with necessary clothing and materials and with large sums of United States currency, and they came to this country by submarine (R. 122–134, 144–152). Herbert picked all the yellow-backed gold certificates out of the money, because, as he assured his associates, such bills were not valid in the United States (R. 171). The evidence traced the landing of Herbert's group in Florida, the caching of their sabotage equipment on the beach, their temporary stay in Florida, and Herbert's ultimate arrival in Chicago (R. 173–185, 199–210, 212–213). Herbert carried $5,000 in $50 bills in a money belt and $400 in bills of smaller denominations, and also a zipper bag in which $10,000 was concealed (R. 124–125, 139–140).

Upon his arrival in Chicago, Herbert went to the Froehling's (R. 525, 571)—his aunt and uncle—then immediately contacted his parents, and lived with his parents until he was arrested. (See *infra*, pp. 13–20.) The overt acts charged against petitioner relate to the events which transpired from the time Herbert arrived in Chicago until he was taken into custody by the F. B. I. a week later.

719467—46—2

B. THE OVERT ACTS SUBMITTED TO THE JURY[4]

The trial court submitted twelve of the twenty-nine overt acts alleged in the indictment (R. 44) to the jury as possible overt acts of treason within the meaning of the Constitution—"as overt acts which may or can be proven by the testimony of two witnesses" (R. 666). Generally stated, two of the overt acts (Nos. 10 and 11, R. 5) charged that petitioner assisted Herbert in obtaining employment so that he might conceal his identity and mission; six (Nos. 12, 17, 20–23, R. 5, 6–7) charged that petitioner harbored Herbert for six successive days from June 22, 1942, to June 27, 1942, inclusive; four (Nos. 13–16, R. 5–6) charged that petitioner accompanied and assisted Herbert in the purchase of an automobile. The evidence in support of these overt acts may be summarized as follows:

(1) ASSISTANCE TO HERBERT IN OBTAINING EMPLOYMENT

Overt Act No. 10.—Overt Act No. 10 charged that on June 22, 1942, petitioner accompanied Herbert to the home of one Andreas Conrad Grunau, for the purpose of assisting Herbert in securing employment, so that he might conceal his identity and mission and so that he might pursue his mission.

---

[4] See *infra*, pp. 22–30, for a summary of evidence, other than that revealed by the overt acts submitted to the Jury, showing petitioner's treasonable intent.

Grunau testified that he was the superintendent of the Simpson Optical Manufacturing Company, which was engaged exclusively in war production during the war and which produced parts for the Norden bombsight (R. 247–248). He belonged with petitioner to a German singing society and he had known petitioner since 1937 (R. 248, 250). Herbert had worked for the Simpson firm from 1939 to 1941 (R. 248–249).

Grunau said that on the evening of June 22, 1942, he came home at about 8 o'clock and found Herbert and his parents waiting for him (R. 249). In response to his inquiry, Herbert, in the presence of petitioner, told Grunau that he had been in Mexico digging gold (R. 249). Herbert assured Grunau that he had registered under the Selective Training and Service Act (R. 249–250), and shortly thereafter, in the presence of his parents, Herbert asked Grunau for a job with the Simpson Optical Co. (R. 250). He was informed that he should come to the plant and fill out an application (R. 250). Herbert inquired whether he could obtain a draft deferment, and he was told that the matter would be handled by the "front office" (R. 250).

Mrs. Grunau testified (R. 253–257) that the Haupts came to her home by automobile sometime after 7 o'clock in the evening. Herbert told her that he had come from Mexico and that he wanted to get his old job back. She corroborated her

husband's testimony that when he came home the Haupts were waiting for him and that in the presence of his parents Herbert explained to Mr. Grunau that he had been in Mexico.

Edith McGowan, a daughter of the Grunaus, testified that she was in her parents' home when the Haupts came there and that petitioner was driving the automobile in which the Haupts came to their home (R. 257–260).[5]

Overt Act No. 11.—This overt act is of the same nature as the previous one, and names one Heinrich Koch as the person whom the Haupts visited in quest of a job for Herbert.

Koch testified (R. 260–263, 286–288) that he was a foreman for the Simpson Optical Company; that he knew petitioner; and that Herbert had worked in his department from 1939 to 1941. At 9:30 p. m. on June 22, 1942, petitioner, Herbert, and Mrs. Haupt came to his home. Herbert explained to Koch that he had been in Mexico and that he wanted to get back his job at the Simpson plant; that he wanted to work in defense work. When Koch questioned Herbert concerning his draft age, petitioner said, "I sent him all this morning to the Draft Board and to the F. B. I."

[5] The testimony of the Grunaus was corroborated by the testimony of several F. B. I. agents who had Herbert under surveillance and who observed petitioner, as well as Herbert and Mrs. Haupt, leave his home and drive to the Grunau residence (R. 432–433, 440–441, 447–449, 453–454, 462–463, 468–469).

(R. 287). When Koch questioned Herbert about where he had been, saying that he thought he had been in Japan, Herbert said, in the presence of petitioner, "we was only a little bit sailing" (R. 288). Herbert also spoke to Koch about a draft deferment (R. 288). Mrs. Koch testified similarly that petitioner, Herbert, and Mrs. Haupt came to the Koch home "to see my husband on business" and that the business concerned a job for Herbert (R. 289–290).

The F. B. I. agents, who were trailing Herbert, testified that they observed the Haupts leave the Grunau residence and go by automobile, with petitioner driving, to the Koch residence, and that at the conclusion of the visit to the Koch home, petitioner drove Herbert and Mrs. Haupt to their home, and he then drove away (R. 433, 441–442, 463–464, 468–469).

(ii) HARBORING AND SHELTERING HERBERT

Overt Acts Nos. 12, 17, 20–23.—Each of these overt acts charges in substantially the same terms that on a specified date petitioner "harbored and sheltered the said enemy Herbert Haupt at the home of Hans Max Haupt and Erna Haupt, 2234 N. Fremont St., Chicago, Illinois, well knowing that the said enemy was an agent of the Government of the German Reich in the United States to commit sabotage, act as a spy, and perform other services for said Government as aforesaid, all with the intent and for the purpose of assist-

ing said enemy Herbert Haupt in carrying out his mission as an agent of the Government of the German Reich as aforesaid."

Petitioner and his wife lived in a front apartment on the third floor of a building at 2234 North Fremont Street; this apartment had only one bedroom. The three-story building is owned by one Kluczyk, who was a witness. It consists of six apartments, three in the front half of the building and three in the rear. The three front apartments are not connected with the rear apartments in any way; the front apartments can be entered only through the single front entrance to the building, and the rear apartments must be entered through an entrance at the rear of the building. Of the three front apartments, the Kluczyks lived on the first floor, the Probsts on the second floor, and the Haupts on the third floor. Both the Kluczyks and the Probsts testified to these facts and that Herbert at no time lived in their apartments. (R. 214–216, 231–232, 237–240, 252; and see R. 325, 445.)

June 22, 1942.—From the testimony of never less than two F. B. I. agents at any one time, it appeared that surveillance of the Haupt residence was started at about 10:30 a. m. Monday, June 22, 1942, and continued until Herbert's arrest on June 27; that Herbert was first seen there on June 22 at approximately 12:25 p. m., when he alighted from a taxicab that had stopped in front of the building in which petitioner lived;

that Herbert walked up the front steps of the building and into the front entrance; and that he was observed leaving the front entrance of the building at 1:45 p. m. (R. 421–425).

At 5:15 p. m. Herbert reentered the front door to the building in which the Haupts lived (R. 423, 425–426). At 7:30 p. m. that same evening, petitioner, accompanied by Herbert and Mrs. Haupt, were observed emerging from the front entrance. They entered petitioner's automobile, and Herbert drove the car around the corner, at which point petitioner took over the operation of the automobile. They were followed by the F. B. I. agents, as we have shown *supra*, pp. 12, 13, to the homes of Grunau and Koch, and later in the evening they returned to the Haupt residence, Herbert and Mrs. Haupt going into the building and petitioner thereafter driving away. Shortly after Herbert and Mrs. Haupt entered the building, the lights in the Haupt apartment were extinguished. (R. 431–433, 440–442, 447–448, 453–455, 463–465, 468–469.)

Mrs. Kluczyk, the wife of the owner of the building, testified that Herbert had lived with his parents prior to the time he left the country, and that she did not see him again until about 11 a. m. on June 22, 1942, in front of the building. On the evening of June 22, Herbert, petitioner, and Mrs. Haupt stopped in the Kluczyks' apartment for a short visit before leaving the building. At that time Herbert stated, in the presence of

petitioner, that he had been in Mexico, South America, and "all over." (R. 216, 221–222; see also the similar testimony of two other witnesses, R. 231–237, 240–246.)[8]

June 23, 1942.—At 12:20 p. m. on June 23, Herbert and Mrs. Haupt were observed emerging from the front entrance to the building (R. 427). At 5:15 p. m. Herbert returned and entered the building (R. 428, 442–443, 483). At about 6:00 p. m. petitioner, Herbert, and Mrs. Haupt came out of the front entrance and proceeded in the Haupt automobile to a restaurant, where they remained for forty-five minutes. When they left the restaurant, Mrs. Haupt separated from the two men, and they proceeded to an automobile sales agency (see *infra*, p. 20). Petitioner and Herbert later drove to their home. Petitioner entered the building, but Herbert walked to a specified street corner. Petitioner came out of the building shortly thereafter and met Herbert at the corner. Both men shortly thereafter returned to the Haupt residence. (R. 428–430, 442–444, 470–472, 483–484.)

---

[8] Mrs. Kluczyk also testified that she had known the Haupt family for twelve years (R. 216); that Herbert left home in June 1941 (R. 216); that at a later date Mrs. Haupt showed her a telegram petitioner had received from Herbert in Tokyo (R. 217–218); that on December 7, 1941, in the presence of petitioner, Mrs. Haupt told her that they were sending a telegram to Herbert in Tokyo (R. 218–219); and that on June 19, 1942, Mrs. Haupt asked her to tell petitioner, when he returned to work, to come to his sister-in-law's house (where Herbert then was) (R. 220).

In the meantime, between 7:30 p. m. and 8:00 p. m., Gustave Zermer, a friend of petitioner's (R. 327–329), arrived at the Haupt apartment (R. 329). Shortly after he entered, Herbert and petitioner also entered together (R. 330). Mrs. Haupt had supper waiting for petitioner and Herbert, so Zermer remained in the parlor while the three Haupts ate in the kitchen (R. 331–332). Meanwhile Mrs. Saure (at that time Miss Melind, a friend of Herbert's) had also come to the Haupt apartment (R. 331). When the meal was completed Zermer joined the elder Haupts in the kitchen and Herbert joined Mrs. Saure in the parlor (R. 332). Both Zermer and Mrs. Saure testified to these facts.

At about 10 or 10:30 p. m., Herbert and Mrs. Saure left the Haupt apartment (R. 323, 472, 485, 489). They proceeded in the Haupt automobile to a tavern. Later, Herbert drove Mrs. Saure to her home and then returned to the Haupt building (R. 430, 444, 489). As on the previous evening, within a few minutes after Herbert entered the building the lights in the Haupt apartment were extinguished (R. 495).

June 24, 1942.—At 7:00 a. m. on this date, petitioner emerged from the apartment building and drove off in his automobile, which Herbert had parked in front of the building when he returned home the previous evening (R. 445). Shortly after noon, two witnesses who were in the Kluczyk

apartment on the first floor heard Herbert and Mrs. Haupt come down the stairs from the Haupt apartment (R. 223, 243–244). Herbert waited in front of the building for a taxicab and drove off in it (R. 445, 485). At 5:30 p. m. Herbert returned and was observed entering the front entrance of the building (R. 455–456). At 6:00 p. m. petitioner and Herbert came out of the building and entered petitioner's automobile and drove to an automobile agency (see *infra*, p. 21; R. 449). Shortly thereafter, Herbert was observed driving away from the automobile agency with a newly acquired Pontiac automobile (R. 449). He arrived at the apartment building at 6:35 p. m. and was observed entering the front door of the building (R. 449, 457). Ten minutes later he left the building and drove to two places, returning at 9:15 p. m. He did not enter the building, but drove off again and returned at 1:00 a. m., June 25 (R. 449–450, 457–459). Shortly after Herbert entered the building the lights in the Haupt apartment were extinguished (R. 434, 462).

June 25, 1942.—At 7:00 a. m., petitioner was seen to emerge from the front entrance to the building. He stood in front of the building, talking to one Carl Eggert, who was waiting for him. While they were conversing, Herbert was also observed coming out the front door (R. 465, 377–378). He drove away in his newly acquired

Pontiac automobile, and returned to the Haupt building at 4:20 p. m. (R. 446, 451, 466). He left the building at 6:45 p .m., wearing different clothing than he had on when he entered (R. 466). He returned at midnight, and, a few minutes after he entered the building, the lights in the Haupt apartment were extinguished (R. 490, 494).

June 26, 1942.—At 7:00 a. m., petitioner was seen leaving the apartment building, and at 9:00 a. m. Herbert came out dressed in different clothing than that which he wore when he entered the building the previous night (R. 490–491, 493, 495). At 5:00 p. m., petitioner returned, and at 6:00 p. m. Herbert returned, both of them entering the building through the front door (R. 466–467, 486). At 7:15 p. m., petitioner left the premises, and at 8:00 p. m. Herbert and Mrs. Haupt were seen leaving the building (R. 467). Herbert returned at 1:50 a. m., at which time he drove up in front of the Haupt home, parked the Pontiac coupe, sat in front of the residence, talked with another young man, and then entered the building (R. 446, 451, 486). When Herbert entered the building the light in the Haupt apartment were not on; they were put on a few minutes later and were extinguished in about ten minutes (R. 491–492).

June 27, 1942.—As we have shown above, Herbert entered the Haupt building at 1:50 a. m.

At 9:05 a. m. he emerged from the building, got into his car, and drove for a few blocks. At this point the F. B. I. agents stopped him and placed him under arrest. (R. 424, 446–447, 451, 480–481, 486–487, 492.)

(iii) PURCHASING AN AUTOMOBILE FOR HERBERT

Overt Acts Nos. 13–16.—These overt acts relate to petitioner's acquistion of a Pontiac automobile for Herbert; they charged that petitioner accompanied Herbert on June 23 and 24 to the Warner Motor Sales Company to arrange for the purchase of an automobile for Herbert and that petitioner signed a financial statement, ordered the car, made an initial down payment on the purchase price, thereafter made a further payment, and completed arrangements for, and did purchase, an automobile for Herbert for the purpose of assisting him in carrying out his mission as an agent of the German Reich.

On the evening of Tuesday, June 23, after having supper with Mrs. Haupt and Herbert at a restaurant (*supra*, p. 16), petitioner drove Herbert to the Warner Motor Sales Company in Chicago (R. 428–429, 443, 471, 484). They entered the showroom, and petitioner told Farrell, a salesman, that he wanted to buy a good used late-model car (R. 304). Petitioner selected a 1941 model Pontiac automobile and inquired if he could purchase it on the installment plan. In response to the salesman's inquiry whether he

had a car to trade in, petitioner said that he had a car, but he did not intend to trade it in; that the new car was for Herbert (R. 304). Petitioner paid a $10 deposit on the purchase price of $1,045 and said that he would come in the next day to make a further payment. Petitioner furnished financial references and signed an order for the car (R. 304–305). During the course of the negotiations, Vinson, the manager, came in and participated in the transaction (R. 305, 312, 314). Both Farrell and Vinson testified as to these events.

On the following evening petitioner and Herbert again went to the Warner Motor Sales Company, and petitioner made an additional payment of $405 on the purchase price. Included in the additional payment were three fifty dollar bills (R. 306, 316).[7] Petitioner signed a note for the balance due and executed the usual finance contract (R. 307, 309). The bill of sale was made out to petitioner (Gov. Ex. No. 55, R. 587). The car was delivered to Herbert, and he drove it away from the sales agency (R. 449). Farrell's testimony to this effect was corroborated by that of Vinson, who testified that he saw petitioner and Herbert come in and that he received the money petitioner paid and the note which petitioner signed (R. 315–316).

[7] Burger testified that Herbert had $5,000 in fifty-dollar bills in a money belt (R. 139–140).

C. PETITIONER'S KNOWLEDGE OF HERBERT'S ENEMY STATUS AND PETITIONER'S INTENT TO BETRAY

To a large degree the Government relied upon petitioner's admissions and other declarations to show that he was aware of Herbert's role as an enemy agent and that he cooperated with Herbert to enable him to carry out his mission. The circumstances under which such statements were made and their nature may be summarized as follows:*

1. Petitioner was arraigned before a United States Commissioner on July 21, 1942. He was advised of the charge against him; he pleaded not guilty; and the matter was then continued before the Commissioner until August 5. (R. 407, 416, 636, 638, 639.) Shortly before noon on August 5, petitioner was present in the "cell room" of the Marshal's office preparatory to further proceedings before the Commissioner at 2:00 p. m. (R. 407). Petitioner summoned the Marshal and said he wanted to talk to an F. B. I. agent (R. 407). In compliance with petitioner's request, two F. B. I. agents were summoned and they talked with petitioner in a private room in the Marshal's office (R. 407–408, 411–412, 417). Petitioner volunteered some information, and the remainder was obtained in answer to questions posed by one of the F. B. I. agents (R. 414–415).

* The jury was instructed that this evidence should be considered only on the issue of treasonable intent (R. 41-42, 500, 515, 587).

Petitioner told the agents, at the opening of the interview, that "he was very mad at Otto Wergin[9] and his wife, because he blamed the predicament of his son on them, and he wanted to testify in court against them" (R. 412, 417). Petitioner then said that on Saturday, June 20, 1942, he, Mrs. Haupt, and Herbert visited the Wergin home and that at that time Herbert told a complete story of his trip to Mexico; how he contacted the German Consul and obtained passage to Japan; how thereafter he ran the British blockade and landed in France and ultimately reached Germany. Petitioner said that Herbert told them that he had been in an "Intelligence School" and that "he had a huge sum of money to use in connection with that over here." Herbert told also of his return to the United States by submarine.[10] (R. 412, 413, 417.)

Petitioner further told the F. B. I. agents that on Friday night, June 19, 1942, he and his

[9] Wergin and his wife subsequently were jointly indicted for treason with petitioner and Mrs. Haupt and with Walter Froehling and his wife. They were all convicted, but the convictions were reversed upon appeal. See *United States* v. *Haupt*, 136 F. 2d 661 (C. C. A. 7). According to the Department's records, Wergin and Froehling subsequently pleaded guilty to misprision of treason, in violation of Section 3 of the Criminal Code (18 U. S. C. 3) and each was sentenced to imprisonment for five years.

[10] Petitioner said that at this time Wergin offered his services to Haupt "because he could use some of the money" which Herbert had (R. 413).

wife were present at the Froehling [11] home where Herbert also related his experience after leaving Chicago (R. 413, 418). According to petitioner's statement to the agents, the Wergins and Haupts were present at the Froehling home on Sunday, June 21, 1942, and Herbert again discussed his trip to Japan and Germany, the intelligence school, and his return to this country by German submarine. They became apprehensive that other people in the building might overhear them, so the Haupts and Wergins left the Froehling home and went to the Haupt's apartment, where "again Herbie Haupt discussed his story." Petitioner advised the F. B. I. agents that it was because the Wergins encouraged Herbert to carry out his mission that he wanted to testify against them in court. (R. 413.)

Petitioner further told the agents that on the following Saturday night, June 27 (the day on which Herbert was arrested), the Froehlings, the Wergins, and petitioner and Mrs. Haupt were together in the Haupt apartment, and that "because Herbie had not shown up all day, they became rather fearful that something had happened to him, and at that time they all * * * decided that if anything had happened to Herbie, or if they were questioned, they would all tell the same story, that they knew nothing about his

[11] Herbert was Mr. Froehling's nephew. See R. 220, 589, and 130 F. 2d 661.

activities, except the fact that he had gone to Mexico." (R. 413, 418.)

2. The witnesses Majerczak (R. 519–564) and Hamby (R. 564–584) were confined in the Cook County, Illinois, jail at the same time that petitioner was there (R. 520, 566–567).[12] Beginning on July 21, 1942, they talked with petitioner concerning his case and concerning their own cases (R. 521–524, 568). They testified that it was after petitioner learned from a newspaper that Herbert had been executed that he began talking of him and his activities (R. 523–525, 568–569). In the course of the various conversations, petitioner said that he had been arrested because Herbert had given him United States money which Herbert obtained in Germany (R. 522–523, 528–529, 570); that Herbert had originally gone to Germany to join the German Army, with petitioner's approval (R. 525, 570); that about a year after Herbert left, petitioner was summoned to the Froehlings' home and Herbert was waiting for him there (R. 525, 528, 571); that Herbert told him of his training in Germany and of his sabotage mission in this country (R. 525–528, 570–572, 577), "to blow up the ammunition dumps, and many factories" (R. 571); that

[12] Both witnesses were then in custody under state charges, and both were convicted and sentenced to life imprisonment in the state penitentiary; both were confined in the state penitentiary under those sentences when they were called as witnesses (R. 519–520, 564–566).

he knew that Herbert "was here for no good reason" (R. 526); that he promised to assist Herbert as much as he could (R. 571); that Herbert gave him $1,000 with which to purchase an automobile for him, and that he purchased an automobile for Herbert (R. 528–530, 571–572); that he received other money from Herbert for safekeeping, which he hid under a rug (R. 528–529, 571); that Herbert told him that he wanted to obtain a job with "the Optical Company," so that he could obtain information in respect of "some kind of a sight" (R. 574); that petitioner did not advise the Government authorities of Herbert's mission because "his son was his own flesh and blood and after all he was helping the fatherland" (R. 573); and that petitioner said "the United States Army was nothing but a bunch of punks, and they are going to fall and they are going to [be] whipped like France and all the rest of the countries" (R. 573); and that at the conclusion of the war, petitioner intended to return to Germany (R. 531).

3. Gustave Zermer, a friend of petitioner's (R. 329), testified that he was present in the Haupt apartment on June 23, 1942 (see *supra*, p. 17), and that at that time petitioner told Zermer that Herbert would be "traveling around all the time" and that he wanted "my address for the mail" (R. 333, 334). Petitioner suggested that Herbert's mail would be sent to Zermer's address and

that Zermer should bring it to petitioner (R. 333–334, 337–338). Zermer agreed to the arrangement (R. 338). Zermer also testified that petitioner inquired whether Herbert could obtain living accommodations in the house where Zermer lived; and that petitioner said that "he was afraid to have Herbert around the house" (R. 336).

4. Carl Eggert, a friend and employee of petitioner's (R. 374–376), testified that he met petitioner at a tavern on Sunday, June 28, 1942 (the day following Herbert's apprehension), and that petitioner paid a debt owed to him by giving him two fifty dollar bills (R. 379).[13] After they had been in the tavern a few minutes petitioner summoned Eggert into a back room and in a voice "just so I could understand it," petitioner said, "Carl, I have $900 of my own money. You can do me a favor and keep it for me. Then I am afraid now the F. B. I. comes in my home and takes it away" (R. 379–380.) Eggert agreed to keep the money for petitioner (R. 380). About three-quarters of an hour later petitioner appeared at Eggert's home and gave him a closed envelope, which Eggert subsequently learned contained eighteen fifty dollar bills (R. 380–382).

5. In addition to the evidence detailed above, the Government adduced the testimony of three

[13] Herbert received $5,000 in fifty dollar bills in a money belt before leaving Germany; note 7, *supra*, p. 21.

witnesses which was concerned exclusively with statements made by petitioner commencing in 1936 which showed that he was more favorably disposed to Nazi Germany than he was to the United States. This testimony was also restricted to the issue of treasonable intent (R. 41–42, 500, 515, 587).

Schroeder, a friend and a fellow worker of petitioner's (R. 498–499), testified that in 1936 and 1937 petitioner told him that he liked Hitler very much (R. 501) and that "we needed a man like Hitler here to rule the country like it was built up over there * * *" (R. 501); that at a meeting of the German World War Veterans in 1939 Schroeder had opposed the sending of money to Germany because Hitler might use it for the purchase of armaments, and that petitioner came to him after the meeting and told Schroeder that "I should shame myself, that I am born in Germany," that "I am not a good German" (R. 506). Some time after Mrs. Haupt had visited Germany and after the German invasion of Poland and France, petitioner told Schroeder that he would kill Herbert himself before he would send him over to Germany to fight against Germany (R. 509).

Mrs. Fishman testified that in 1940 petitioner and Mrs. Haupt worked for her "as a couple" and that they and Herbert lived on her premises (R. 512); that petitioner told her that on weekends Herbert attended a Bund camp at Luding-

ton, Michigan (R. 512);[14] that petitioner said that "they would go up there and train; it was the proper thing for German people who were real Germans to send their children there and raise them like that" (R. 513); that in May 1940, petitioner said, "Hitler was a God-send to the German people" (R. 515); that "if we entered war against Germany we would have a revolution in this country like they had there after the last war; that we have German organizations back here that would take our armories over, our electrical companies, our telephone companies; that the same thing would happen to us as happened in Norway and France, that we would be taken from within by Fifth Column activities" (R. 516–517); and that this would be done by the German organizations to which he belonged (R. 517).

Hans Poppe testified that he had known petitioner since 1936 (R. 587–588) and that they had worked together from 1937 to 1939 (R. 588); that on several occasions in 1939, petitioner told him that he took Herbert and other boys to a Bund camp in Michigan (R. 589–590);[15] that petitioner said in 1939 that "if war would break out with the United States and Germany, he would never permit his boy to join the American Army. He would send him to Mexico, and from

[14] There was other evidence that Herbert regularly attended Bund meetings (R. 401–402).

[15] See note 14, *supra*.

there he could go to Germany and join the Air Force" (R. 590); that petitioner said further that if this country should "take him in the Army, he would crawl over the enemy lines and tell them our position" (R. 590); and that petitioner said in 1939 that "he had no feeling for the United States at all. His feelings were only for Germany, and he wished Hitler would come over here and drive all the Jews out, because the Jews are running this country" (R. 590–591).

SUMMARY OF ARGUMENT

1. The indictment charged and the evidence established the offense of treason.

A. The overt acts submitted to the jury charged (1) that petitioner sheltered and harbored an enemy agent engaged in a hostile mission, (2) that he arranged for and consummated the purchase of an automobile for the agent's use, and (3) that he assisted the agent in obtaining employment. All these acts were acts of direct aid and comfort to the agent and to the enemy nation which he represented. Obviously, the giving of food and shelter to an enemy agent aids and comforts that agent. Similarly, the furnishing of any means of transportation to the enemy is an overt act of aid and comfort, and has always been so considered. Moreover, in their setting here, the arrangements for and the purchase of the automobile for Herbert assisted him in carrying out the specific command

of his German superiors, to procure an automobile for the use of his fellow saboteurs.

Likewise, while assisting an enemy agent to obtain any kind of employment is an act of aid and comfort, since it enables him to conceal his enemy character, here petitioner's aid was more than just generalized help. For Herbert had been expressly ordered to get employment with the Simpson Optical Company, in order to get information about the bombsight which was being manufactured there, and in order to get information about the plant itself so that it could be more effectually destroyed. Petitioner's acts therefore directly contributed to the success of Herbert's mission. And regardless of whether petitioner was silent at the interviews, his mere presence there, at the home of his friends who were foremen at the plant, added weight to Herbert's application; and his silence, in the face of Herbert's false story, amounted to confirmation of that tale. Petitioner's silence was not neutral conduct. It backed up the false story, dispelled suspicion, and lent an air of honest family respectability to an enemy sabotage mission. Certainly petitioner's friends would not for a moment have considered giving Herbert a job if they had known that he was an enemy agent with the dual mission of spying out the plant's secrets and of thereafter blowing it up. To suggest, therefore, that petitioner's presence did not amount to aid

in obtaining employment is utterly to ignore the realities.

The circumstance that the overt acts charged were also services which a father might normally render to a son does not change their character as acts of aid and comfort. A father performing such acts unquestionably gives aid and comfort to his son, and when that son is an enemy spy and saboteur, then he necessarily gives aid and comfort to the enemy. The ultimate treasonable character of the acts may depend on the intent with which they were performed, but that circumstance in no way minimizes their effect as aid to the enemy. Consequently the overt acts submitted to the jury were legally sufficient overt acts of treason within the rule of *Cramer* v. *United States,* 325 U. S. 1.

B. The doing of the overt acts was not seriously contested at the trial, and the real issue there was as to intent. There was ample evidence from which the jury could find that, with knowledge of Herbert's hostile mission, petitioner intended to and did aid that mission. Since petitioner knew that aiding his son's mission would further enemy plans, he must have intended to aid the enemy. That he may also have been motivated by a desire to aid his son does not render his acts less treasonable. *Cramer* v. *United States,* 325 U. S. 1, 31, 55; *Hanauer* v. *Doane,* 12 Wall. 342, 347. The instructions to the jury on motive

and intent fully complied with the standards laid down in the *Cramer* case and correctly rejected petitioner's notion that the father-son relationship was itself a defense to the charge. As the trial judge properly noted, "I have no right to help my son commit treason."

2. In order to determine whether all of the overt acts submitted to the jury were proved by "the Testimony of two Witnesses" as required by the Constitution, it is necessary to ascertain the significance of the constitutional provisions, "not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States*, 233 U. S. 604, 610.

A. After the two-witness rule in treason prosecutions had become a part of English law by the St. 7 Will. III, c. 3, the English courts before the American Revolution did not require that evidence be direct in the sense that it be direct eye-witness proof which excluded all process of inference. The treatises, and trials had before judges of the stature of Holt, Foster, and Lord Mansfield, show that while evidence which gave rise merely to an inference of guilt was rejected, evidence which directly tended to establish that the act charged had been committed was held sufficient, even though it might not be eye-witness testimony, and even though eye-witness testimony had to be interpreted in the light of the circum-

stances to which it related. It was enough that the matter appear "plainly, clearly, and satisfactorily."

B. It is abundantly clear from the historical evidence that the two-witness requirement in the Constitution had its origin in the terms of the St. 7 Will. III, which was well known to the American bar. The debates show that the modification made in the Convention, requiring two witnesses to the same overt act at all times (and not merely when only one such act was alleged), was directed against prosecutions inspired by virulence and supported by perjury, and was adopted at a time when the defendant in a criminal trial was not a competent witness on his own behalf.

C. Expressions of judges who participated in the framing and adoption of the Constitution indicate that, as to such of the antecedent statutory provisions as were carried over into that instrument, the English interpretations are to be followed. There is no intimation to the contrary by any judge whose adult life was contemporaneous with ratification. And the first two American decisions on the nature of the required two-witness testimony in fact apply the standards developed in England under the St. 7 Will. III, and support the conclusion that the necessity for some interpretation does not render the testimony insufficient. *United States* v. *Mitchell,* 2 Dall. 348 (1795); *United States* v. *Burr,* Fed. Case No. 14693 (1807). The ruling in the *Mitchell* case,

that the requirement is satisfied if each witness testifies to complementary parts of a continuous act, was expressly approved by Chief Justice Marshall at the trial of *Burr*. What was said in the latter case about the infirmity of "presumptive evidence" dealt with a situation where the prosecution attempted to show the defendant constructively present at a place where the evidence showed him to be not present. Both decisions permit normal and compelling inferences to be drawn from the corroborating evidence of several witnesses. The only modern cases on the sufficiency of evidence which seem to be opposed deal with entirely different factual situations.

D. Viewed in the light of what the constitutional provision really means, the overt acts here fully meet the test laid down.

The only substantial challenge to the sufficiency of the two-witness proof is to the evidence relating to harboring on days other than June 23, 1942, when no witness testified to having seen petitioner and Herbert together in petitioner's apartment. There was, however, direct observation by two witnesses of petitioner and of the spy whom he was accused of aiding at the time and location at which aid was alleged to have been given. There was also direct testimony by two witnesses as to the physical surroundings in which petitioner and the spy whom he aided moved. All the evidence directly related to the act in question. The competent facts, each di-

rectly observed by two witnesses, left nothing to conjecture, and compellingly and inescapably established that petitioner was harboring Herbert at the time and place that the observations were made. In those circumstances the constitutional requirement is fully satisfied.

Cramer v. *United States,* 325 U. S. 1, is not to the contrary; it dealt with a situation where the *quality* of the act was in question, not the *doing* of the act. Here the instructions to the jury required proof by "two direct witnesses," and rejected petitioner's view that eye-witnesses were required. Those instructions were correct. To contend that the overt acts here involved were not proved by two witnesses would pervert a basic constitutional guarantee into a ritualistic abracadabra wholly unrelated to its purpose.

3. Even if some of the overt acts should be deemed not to have been proved by the testimony of two sufficient witnesses, the judgment of conviction must still be affirmed.

A. There can be no doubt that a person who, with intent to betray, commits a single overt act of aid and comfort to the enemy, and who is proved to have committed such act by the testimony of two sufficient witnesses, may properly be convicted of treason. The elements of the crime are not changed because the indictment alleges more than one overt act. And a person who is shown by proper proof to have committed one

act of treason is not entitled to go free because he did not commit another such act as well. Accordingly, it was proper to instruct the jury that they could convict on finding that one overt act had been established by two witnesses. Such has always been the law, in an unbroken line of authority from the early English cases down to the present time, from the *Trial of the Regicides*, 5 How. St. Tr. 947 (1660), through *Stephan* v. *United States*, 133 F. 2d 87, certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423 (1943). Every modern American jury considering a case of treason has uniformly been charged to the same effect.

B. In ordinary criminal cases where numerous overt acts are alleged, it has always been considered sufficient to support a verdict if, on appeal, a single overt act is shown to be supported by evidence. This is the unquestioned rule in conspiracy cases. Similarly, in mail fraud cases, it is sufficient on appeal if the evidence shows that the scheme to defraud was devised by at least one of the means or representations alleged, regardless of how many others may have been laid in the indictment. Likewise, a sentence is good on appeal if supported by a single good count, regardless of whether the trial judge in fact would have imposed that sentence had he known of the infirmities on the other counts, because "the pre-

sumption of law is that the court awarded sentence on the good count only." *Claassen* v. *United States*, 142 U. S. 140, 146–147.

Moreover, where an indictment consists of several counts, a general verdict of "guilty as charged" will stand if any of the counts is good. While this situation is distinguishable for at least two reasons, the jury in such cases may well have rested its verdict largely on the counts later held bad. Here, if instead of one count with twenty-nine overt acts, there had been an indictment with twenty-nine counts each alleging a single overt act, a general verdict would have been unassailable.

C. Since special verdicts are not generally employed in criminal cases (compare F. R. Crim. P. 31 with F. R. Civ. P. 49), a contrary rule would mean that a defendant could never be charged with more than one overt act of treason except at the risk of acquittal if a single additional overt act submitted to the jury failed of proof. This would mean that the more active the traitor and the more complex his treason, the better his chances of escaping punishment. This would also completely overturn the hitherto settled rule in treason cases.

There is no precedent for asking for special verdicts in cases where several overt acts are charged in an indictment, and petitioner did not ask for special findings here. Even if a special verdict had been rendered, the conviction would still have been good if all but a single overt act

so specially found had been held insufficient on appeal. And here, where the jury were told that an overt act must be proved beyond a reasonable doubt, and by two direct witnesses, and were further told that the submission to them of any overt act carried no suggestion that such overt act had in fact been committed, the question of the evidentiary sufficiency of the overt acts was properly left to them as triers of the facts. The rule contended for by petitioner, that the whole conviction fails if the evidentiary sufficiency of any overt act fails, would invade the province of the jury, and would substitute this Court for a properly instructed jury in the determination of whether he, in fact, did the acts he was charged with doing.

D. The only authorities apparently to the contrary involve situations where, by misdirection of the jury, the prosecution was predicated on an unconstitutional ground or statute. *Stromberg* v. *California,* 283 U. S. 359, 368; *Williams* v. *North Carolina,* 317 U. S. 287, 292. Those cases were, without question, properly decided on their facts; but they do not support the broad and generalized rule stated in the *Cramer* footnote, 325 U. S. 1, 36, n. 45, that "Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient." The justification for setting aside Cramer's conviction must be found in the circumstance that it appeared prob-

able that he was found guilty on the insufficient overt acts. Because of the misdirection there, it is highly unlikely that the jury would have found Cramer guilty of treason simply because of a false statement to an F. B. I. agent, which was retracted almost immediately thereafter.

The rule of the *Stromberg, Williams,* and *Cramer* cases is a rule of reason, not an immutable absolute. The *Cramer* footnote did not purport to question the rule of the conspiracy or mail fraud cases, nor to alter the rule of the treason cases, which was not even discussed in the voluminous briefs there filed. The authorities not only do not support the application of the rule as stated in the *Cramer* footnote to a treason case such as this one; on the contrary, the basic approach of the general authorities, of the cases involving analogous offenses, and of the consistent rule in treason cases, is uniformly the other way.

E. In the present case it is utterly unreasonable to suppose that the jury could have rested its verdict on the overt acts whose sufficiency as to proof is disputed. The only conceivable challenge in this respect is as to the evidence of harboring on the days when no witnesses were in petitioner's apartment.

Actually, however, those overt acts charge only a single act of aid and comfort: sheltering and harboring an enemy saboteur. As a matter of draftsmanship, all the days could have been charged as a single overt act. The time was not a

matter of substance; the essence was not the harboring on any one day, but the act of harboring. That act was clearly proved by two witnesses. The doing of the overt acts was scarcely contested at the trial; and it would certainly be highly unreasonable to suppose that the jury would have disbelieved the two witnesses who saw Herbert inside the apartment and would have believed only the witnesses who saw him with petitioner outside the apartment. Since there is here no possibility that the verdict was based on conduct which was insufficient, there is no reason to invoke the extraordinary rule of the *Stromberg, Williams* and *Cramer* cases, which themselves involve a departure from normal principles of appellate review in criminal cases.

A reversal here on the ground that any of the overt acts failed of proof would turn appellate review into a contest between the draftsman of the indictment and the ultimate reviewing court; would exalt form over substance; and would legislate into the law of treason a qualification which no English or American judge ever found there prior to August 1943, and one which the Founders certainly did not fashion.

4. There were no errors in the admission of evidence.

A. This Court in *Cramer* v. *United States*, 325 U. S. 1, reaffirmed the rule that intent in cases of treason need not be proved by two witnesses,

and that any relevant evidence could properly be offered in addition to the required two-witness proof of an overt act. It was thus proper to admit, on the issue of intent, evidence of (1) pre-war statements by petitioner showing intense devotion to Hitler and to Germany; (2) one-witness testimony concerning overt acts alleged in the indictment but not submitted to the jury as overt acts of treason; and (3) extra-judicial admissions by petitioner.

The pre-war statements were not of general criticism of the United States or refusal to buy war bonds, but were statements expressing petitioner's intent to be loyal to Germany and to urge his son to serve in the German armed forces in the event of a war between Germany and the United States. They reflected petitioner's feeling of allegiance to a foreign power, and thus had a direct bearing on the intent with which he performed the acts of aid and comfort submitted to the jury.

Evidence of overt acts withdrawn from the jury could not, of course, supply a deficiency in the two-witness proof of the submitted overt acts, but it was clearly relevant to show the intent with which the properly proved overt acts were done. Even under the St. 7 Will. III, which provided that no evidence could be given of overt acts not expressly laid in the indictment, it was consistently held that an overt act not laid might

be given in evidence if it be direct proof of any of the overt acts that were laid. And on principle, clearly, the circumstance that particular overt acts were first alleged and then withdrawn does not render evidence thereof less relevant on the issue of intent.

Petitioner's extra-judicial confessions were likewise admissible. The Constitution, following the St. 7 Will. III, permits a confession as a substitute for two-witness proof of the overt act only if the confession is made in open court; but where the overt act is otherwise sufficiently proved by two witnesses, that provision does not preclude the use of an extra-judicial confession as additio al evidence, by way of corroboration. This point is clear on principle, and on the authority of both the English cases and of the early American treason cases before and after the adoption of the Constitution.

B. The testimony concerning the nature of the saboteurs' mission, and the exhibits introduced in connection therewith were admitted solely on the issue of Herbert's enemy status. Since it was an essential part of the prosecution's case to prove that Herbert was an enemy agent in this country for the purpose of performing a hostile mission, this evidence was properly received for the limited purpose for which it was offered.

C. It was proper to permit the prosecution to cross-examine one of its own witnesses, since that witness professed ignorance in regard to matters

about which he had previously testified in considerable detail.

5. There was no misconduct on the part of Government counsel in their closing arguments to the jury. Most of the matters objected to were references to testimony which petitioner erroneously assumes to be incompetent. For the rest, a reading of the prosecution's summing up establishes that Government counsel exercised due restraint, and conducted themselves at all times in a thoroughly lawyer-like manner. The charge that they appealed to prejudice of war hysteria is totally unfounded.

6. Petitioner's objections to the trial judge's charge to the jury are based largely on matters already discussed elsewhere in this brief, i. e., the distinction between intent and motive, the instruction that one overt act proved by two direct witnesses was sufficient to convict, and the consideration to be given to the testimony offered on the issue of intent. Petitioner's requested instructions either embodied erroneous theories of law, or else were adequately covered in the judge's charges. The instructions given were correct, and the record reflects the painstaking care with which they were framed.

7. No errors occurred in connection with the deliberations of the jury.

A. Sending copies of the indictment and of the charge into the jury room was clearly a matter within the trial judge's discretion; and, in a case

as complex as this one, that discretion was not abused.

B. The judge's decision to accede to the jury's request for the rereading of a portion of the testimony was likewise a matter within his discretion. Here the rereading was accompanied by a warning to the jury not to give undue weight to the testimony which was being reread.

C. The jury's deliberations were neither unusually nor unduly long. Compare *Hyde* v. *United States*, 225 U. S. 347, 383.

D. After the jury rendered its verdict, it submitted to the court a plea for clemency, signed by all the jurors. In consequence of this action the trial judge did not sentence petitioner to death, as he would otherwise have done. Accordingly, petitioner's contention here, that the verdict of the jury was the result of war hysteria, passion, and prejudice, is shown by the record to be wholly without support in fact.

ARGUMENT

I. THE INDICTMENT CHARGED AND THE EVIDENCE ESTABLISHED THE CRIME OF TREASON

A. *The overt acts were acts which gave the enemy aid and comfort.*—As we have shown above, pp. 10–21, the overt acts submitted to the jury fall into three categories: they charge (1) that petitioner harbored and gave shelter to Herbert, a known enemy agent; (2) that he assisted Herbert in obtaining employment; and (3) that he aided

in purchasing an automobile for Herbert's use. This mere recital completely refutes petitioner's contention (Pet. 41–45) that such acts are not overt acts of treason within the rule of *Cramer* v. *United States*, 325 U. S. 1. This Court there said (325 U. S. at 34) that

> The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy.

Sheltering an enemy spy, supplying him with means of transportation, and assisting him to obtain employment, are obviously not colorless acts; they are direct acts of assistance to the spy and to the enemy nation which he represents.

1. Petitioner does not seriously challenge the sufficiency of the harboring allegations as charging overt acts of treason, for undoubtedly the giving of food and shelter to an enemy spy aids and comforts the enemy. As the Court noted in the *Cramer* case, in commenting on the insufficiency of the overt acts there involved (325 U. S. at 37), "Cramer furnished them no shelter, nothing that can be called sustenance or supplies * * *."[16]

---

[16] See also *Stephan* v. *United States*, 133 F. 2d 87, 93 (C. C. A. 6), certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423.

Petitioner concentrates his attack on overt acts 10, 11, 13, and 15, the first two charging that petitioner accompanied Herbert for the purpose of obtaining employment, and the latter two charging that petitioner accompanied Herbert to a motor sales agency to arrange for and complete the purchase of an automobile.[17] He argues (Pet. 41–45) that the act of accompanying Herbert in each instance is no more an act of aid and comfort to the enemy than the act of meeting which was held insufficient in the *Cramer* case. But such a contention misinterprets the *Cramer* decision. That decision did not hold that an act of meeting with a known enemy can never be an overt act of treason; it held only that proof of a meeting, without evidence of what transpired at the meeting, was insufficient to establish that the act of meeting gave aid and comfort to the enemy. As this court said (325 U. S. at 37),

> By direct testimony of two or more agents it was established that Cramer met Thiel and Kerling on the occasions and at the places charged and that they drank together and engaged long and earnestly in conversation. This is the sum of the overt acts as established by the testimony of two witnesses.

Here, on the other hand, the indictment charged that petitioner accompanied Herbert for

[17] The sufficiency of overt acts 14 and 16, alleging payments made by petitioner for the purchase of the automobile for Herbert, is apparently conceded.

specific purposes, to assist him in obtaining employment and to make arrangements for buying him an automobile, and those specific purposes were each proved by the direct testimony of two witnesses. And, if we regard each act of accompanying Herbert "in its setting", as the *Cramer* decision admonishes us to do (325 U. S. at 34), the sufficiency of these acts as acts giving aid and comfort is even more sharply underscored; for Herbert had been instructed by his German superiors to get employment at the Optical Company and to get an automobile (*supra*, pp. 7–8). Here petitioner's acts of accompanying Herbert directly and substantially furthered the success of Herbert's sabotage mission.

2. It cannot be doubted that the purchase of an automobile for an enemy agent, the purpose alleged in overt acts 13 and 15, is an act which gives aid and comfort to the enemy. The furnishing of any means of transportation to the enemy has always been held to be such an overt act. *Charge to Grand Jury*, 4 Blatchf. 518, 520–521, Fed. Case No. 18270, 30 Fed. Cas. at 1034 (C. C. S. D. N. Y.); *Charge to Grand Jury*, 1 Bond 609, 611, Fed. Case No. 18272, 30 Fed. Cas. at 1037 (C. C. S. D. Ohio).[18] And in their setting

[18] Similarly, the supplying of provisions to the enemy is considered an obvious overt act of adhering to the enemy, giving him aid and comfort. *United States* v. *Fricke*, 259 Fed. 673, 676 (S. D. N. Y.); *Charge to Grand Jury*, 4 Blatchf. 518, 520–521, Fed. Case No. 18270, 30 Fed. Cas. at 1034; *Charge to Grand Jury*, 5 Blatchf. 549, 550, Fed. Case No.

here, the arrangements for and purchase of the automobile for Herbert were not only abstractly acts of aid and comfort, they assisted Herbert in carrying out the specific orders of his superiors in Germany, to procure an automobile for the use of his fellow saboteurs, "to remove our explosives from the place where they were * * * hidden," and "to give us range for our operations" (R. 115, 116). It is difficult to think of anything that petitioner could have done for Herbert during those first few days after his return to Chicago that added more to the success of the saboteurs' mission than just precisely this purchase of an automobile.

3. Similarly, while assisting an enemy spy to obtain employment of any kind is normally an act of aid and comfort to him, since it enables him to mingle without suspicion with the population and thus to conceal his identity, petitioner's acts here which assisted Herbert to get

---

18271, 30 Fed. Cas. at 1035 (C. C. S. D. N. Y.); *Charge to Grand Jury*, 1 Bond 609, 611, Fed. Case No. 18272, 30 Fed. Cas. at 1037; *United States* v. *Greathouse*, 4 Sawy. 457, 479, Fed. Case No. 15254, 26 Fed. Cas. at 24 (C. C. N. D. Cal.); see *Hanauer* v. *Doane*, 12 Wall 342, 347; *Carlisle* v. *United States*, 16 Wall. 147, 150–151.

And see Foster, *Crown Law*, 217: "Furnishing Rebels or Enemies with Money, Arms, Ammunition or other Necessaries will *Prima facie*, make a Man a Traitor."

All references in this brief to Foster, *Crown Law*, are to the folio edition of 1762, as that alone was available prior to the adoption of the Constitution. But the pagination in the second edition of 1791 is not materially different.

employment showed, when considered in their setting, more than just such generalized help. For Herbert had been specifically directed to get particular employment, with the Simpson Optical Co., for two reasons: first, to get information about the Norden bombsight which was being manufactured there, and second, to get information about the plant so that it could be more effectually blown up (R. 115, 120, 159, 160). Consequently, in this instance also, petitioner's acts were directly contributing to the success of Herbert's mission as that mission had been prescribed by the sabotage school in Germany.

Petitioner's argument that "no witness whatever offered any proof that the defendant assisted or attempted to assist Herbert Haupt to secure such employment" (Pet. 31) seems to be based on the circumstances that Herbert, rather than the petitioner, asked Grunau and Koch to re-employ him, and that it was Herbert who carried the brunt of the conversation during both interviews.

But this ignores the plain fact that petitioner's mere presence at the interviews was itself an act of assistance to Herbert, and one which added a weighty indorsement to Herbert's application. Both Grunau and Koch were friends of petitioner of long standing. Both were prospective employers. Any father who accompanies his sons to the homes of friends who are in a position to give employment does so precisely in

order to lend moral support and to place his imprimatur of approval on the son's application. That is why petitioner accompanied Herbert to the homes of Grunau and Koch instead of letting him take his chances at the company's employment office on his own.

Moreover, while Herbert falsely explained to petitioner's old friends that he had been in Mexico digging gold, petitioner, who knew that Herbert had been in Japan and Germany and knew as well of Herbert's sabotage mission, remained silent. Regardless of whether any duty to speak can be spelled out of such a situation, petitioner's silence in the circumstances amounted to confirmation. Certainly neither Grunau nor Koch, trusted foremen at the Simpson plant, would have considered giving Herbert a job if they had known that Herbert was an enemy agent with the dual mission of spying out the plant's secrets and of thereafter blowing it up. They would have known that if petitioner had not remained silent. Petitioner's failure to contradict Herbert's story implied a guarantee of the son's veracity, a confirmation of Herbert's lie that he had been digging gold in Mexico and that "we was only a little bit sailing" (R. 288). Petitioner's presence in the homes of his friends and his silent support of Herbert's tale, when he knew that recital to be false, was of very substantial assistance to an enemy agent engaged at that very moment in obtaining the precise employment which the German

Government had ordered him to get. Petitioner's actions were not neutral conduct; on the contrary, his conduct backed up Herbert's false story, dispelled suspicion, and lent an air of honest family respectability to an enemy sabotage mission. To say, therefore, as petitioner does, that there was no proof that he assisted or attempted to assist Herbert in securing employment at the optical plant, is simply to fly into the face of the facts and utterly to ignore the realities.

4. It is of course true that the ultimate treasonable character of all these overt acts depends on facts outside the acts themselves—on petitioner's knowledge of Haupt's hostile mission and on petitioner's intent to aid that mission. But those other facts go to the question of intent, not to the character of the overt acts as acts of aid and comfort to the enemy. We point out below, pp. 53–57, that the question of petitioner's intent to aid the enemy was decided against him by the verdict of the jury; here we are considering simply the character of the overt acts.

Petitioner seems to argue that, since the acts here charged are services which a father might normally render to his son, they cannot be overt acts of treason. But a father who supplies his son with food and shelter, who purchases an automobile for his son, and who assists his son in obtaining employment, unquestionably gives his son aid and comfort. When that son is an enemy spy, the father necessarily gives aid and comfort to the

enemy. And when, as here, the father knows that his son is engaged in a hostile mission and renders assistance with intent to aid that mission, then all the elements of the crime of treason have been established.

Had petitioner been wholly unaware of Herbert's enemy status, he would have lacked the necessary intent and so could not have been guilty of treason, but his acts would nevertheless have helped the enemy. Consequently, those acts are overt acts of treason within the rule of the *Cramer* case.

B. *Petitioner's treasonable intent was not nullified by his relationship to the enemy agent.*—In general, the actual occurrence of all the overt acts is not disputed, and was not seriously controverted at the trial. The fact that the purchase of the automobile was made for Herbert was conceded by petitioner's counsel both in his opening statement (R. 104–105) and in his summing up (R. 799); indeed, petitioner offered testimony designed to show that the purchase was made to replace an automobile which Herbert had left behind when he went to Germany (R. 632–634). The sheltering of Herbert by petitioner was virtually admitted, both in the opening (R. 105) and in the closing argument (R. 790–791, 800, 806–807), and the same is true as to assistance in obtaining employment (R. 105; 800, 804, 805, 806). The real issue at the trial, as defense counsel's arguments show (R. 798–808), was

not the doing of the overt acts, but the intent with which the acts were done.[19]

Petitioner does not deny that there was sufficient evidence from which the jury could infer that, with knowledge of Herbert's enemy status, he intended to and did assist him in the performance of that mission. The evidence, therefore, fully warranted the jury in finding that petitioner performed the acts of aid and comfort with intent to adhere to the enemy, *i. e.* that he had a specific treasonable intent. The fact that he may also have been motivated by a desire to aid his son does not render his conduct any the less treasonable. As this Court said in the *Cramer* case (325 U. S. at 31–32),

> * * * The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. Proof that a citizen did give aid and comfort to an enemy may well be in the circumstances sufficient evidence that he adhered to that enemy and intended and purposed to strike at his own country. It may be doubted whether it would be what the founders intended, or whether it would well serve any of the ends

[19] See the close of the argument on behalf of petitioner (R. 808): "I ask you to set Hans Max Haupt free, for all he did is that he acted as a father to a son and not as a traitor. Hans Max Haupt is not a man with a black heart. * * *"

> they cherished, to hold the treason offense available to punish only those who make their treacherous intentions more evident than may be done by rendering aid and comfort to an enemy. Treason—insidious and dangerous treason—is the work of the shrewd and crafty more often than of the simple and impulsive.

Since petitioner knew that aiding his son's mission would further enemy plans, he must have intended to aid the enemy. His incidental motivation is immaterial. As the minority in the *Cramer* case pointed out, discussing the question of intent on which there was no division of opinion in this Court (325 U. S. at 55):

> "A man who voluntarily assists one known or believed to be an enemy agent may not defend on the ground that he betrayed his country for only thirty pieces of silver. * * * For the same reasons a man cannot slip through our treason law because his aid to those who would destroy his country was prompted by a desire to "accommodate a friend."

See also *Hanauer* v. *Doane*, 12 Wall. 342, 347; *Carlisle* v. *United States*, 16 Wall. 147, 150–151; *Sprott* v. *United States*, 20 Wall. 459, 463; *Stephan* v. *United States*, 133 F. 2d 87 (C. C. A. 6), certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423. The situation is not different because the enemy who is extended aid

is a son rather than a friend. Family loyalty does not override national allegiance. In the words of the trial judge (R. 682), "I have no right to help my son commit treason."

The charge to the jury on intent (Instructions Nos. 53–55, R. 40–41) was in complete accord with the principles thus laid down by this Court in the *Cramer* case. Petitioner's theory, that he should be set free because "all he did is that he acted as a father to a son and not as a traitor" (R. 808), received from the trial judge the full recognition to which it was entitled. Instruction No. 37 (R. 35) was:

> 37. If you are not satisfied, beyond a reasonable doubt, that the defendant's intention and purpose in acting as he did was evil, that is, if you are not satisfied beyond a reasonable doubt that the defendant intended to aid and comfort the enemies of the United States the defendant must be found not guilty. If you believe the defendant's intention in doing what he did during the period from June 17, 1942, to and including July 17, 1942, was not in any way to injure the United States but merely to assist his son, Herbert Haupt, as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injurying the United States, the defendant must be found not guilty.

Petitioner's objections to the charge on intent (Pet. 64–73) are thus without merit. They pro-

ceed on the basic misconception that a son can never be an enemy agent. And as for petitioner's contention that the definition in the Illinois statute of an accessory after the fact has some bearing on the issue of intent (Pet. 45–46), it is of course perfectly obvious, as the court below held (R. 918–919), that no state law can affect the elements of a crime defined, not only by federal statute, but by the Constitution itself.

II. ALL THE OVERT ACTS SUBMITTED TO THE JURY WERE SUPPORTED BY THE TESTIMONY OF TWO WITNESSES WITHIN THE MEANING OF THE CONSTITUTION

The Constitution provides that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act"—"or on Confession in open Court", and there is no such confession here. The problem in this case, at the present juncture, is to determine the meaning of "Testimony of two Witnesses" insofar as it affects the sufficiency of the present proof—whether, for example, the overt act of sheltering has been proved by two witnesses when both see the enemy agent entering the front door of the apartment house, which is proved by other witnesses to lead only to three apartments, two of which the agent did not enter; when both see the lights in the defendant's apartment go on a few minutes later, that apartment having been previously dark; when both see the lights extinguished a short time later; and when both, the

next morning, see the enemy agent emerge from the front door, wearing clothing different from that which he wore when he entered the same door the previous night. Is there anything in the Constitution which imperatively requires a holding that in those circumstances the overt act of sheltering the enemy agent has not been proved by "the Testimony of two Witnesses to the same overt Act"?

In the resolution of that question, Mr. Justice Holmes' admonition in *Gompers* v. *United States*, 233 U. S. 604, 610, seems to us controlling—

> * * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

So we do not pause now to consider whether, as a matter of language, "Testimony" means "eye-witness testimony," nor whether it means "direct testimony"; nor to discuss whether, assuming the latter limitation, "direct testimony" excludes any sort of evidence which by common parlance might be classified as circumstantial. We propose to examine at the outset the origin of the constitutional provision and the lines of its growth, and to consider just precisely the kind of evidence which previously has been held to satisfy the two-

witness requirement. Not until then will we be in a position to appraise the sufficiency of the present proof or to evaluate the conclusion of the majority of the court below (R. 887–901), that all twelve of the overt acts submitted to the jury were proved by the testimony of two witnesses as required by the Constitution.

A. *The two-witness requirement in English treason cases was held satisfied by evidence which required interpretation; and the two witnesses were permitted to testify to different parts of the same overt act.*—After the two-witness rule in treason prosecutions had become embedded in the English law by the St. 7 Will. III, c. 3, the English Courts before the American Revolution regularly held that while evidence tending only inferentially to establish guilt was insufficient, other evidence which had a rationally direct tendency to establish the doing of the overt act alleged, so that only one result could follow, was deemed sufficient, notwithstanding that some process of reasoning and interpretation was necessary.

The history of the two-witness requirement is authoritatively traced in 7 Wigmore, *Evidence* (3d ed. 1940), § 2036; for present purposes we need only note his conclusion (p. 268) that "The ensuing legislation of William III, after the Revolution, established the law", and that "From the beginning of the 1700s there has never been any

doubt or vacillation upon the rule that two witnesses at least are required upon a charge of treason."

Section 2 of the definitive statute, St. 7 Will. III, c. 3, enacts that from and after March 25, 1696,

> * * * noe person or persons whatsoever shall bee indicted tryed or attainted of high treason whereby any corruption of blood may or shall bee made to any such offender or offenders or to any the heir or heirs of any such offender or offenders or of misprision of such treason but by and upon the oaths and testimony of two lawfull witnesses either both of them to the same overtact or one of them to one and another of them to another overtact of the same treason unlesse the party indicted and arraigned or tryed shall willingly without violence in open court confesse the same or shall stand mute or refuse to plead or in cases of high treason shall peremptorily challenge above the number of thirty five of the jury any law statute or usage to the contrary notwithstanding.

So far as an indictment for treason alleging but a single overt act is concerned, the quantitative requirement of the St. 7 Will. III is, of course, identical with that of our Constitution.

One of the first cases to apply the statute, *Trial of Robert Lowick*, 13 How. St. Tr. 267 (1696), presented squarely the problem of how direct the testimony of the required two witness had to be.

There the indictment charged as overt acts of compassing the king's death, a meeting on February 10 at which plans were laid for the murder of the king, and the procurement of men and equipment to perform the assassination (pp. 282–283). Only three witnesses testified. Of these, one Harris stated that he was sent to England from France with directions to take orders from Sir George Barcley; that on his arrival in England he was told of the plan to assassinate the king by persons other than the defendant; that subsequently, the defendant, in the course of a casual discussion of the plans, stated that he would obey orders, and at another time that he was furnishing two men, although he was receiving no compensation therefor (pp. 285–287). Another witness, Bertram, testified that the defendant asked him if he were willing to do as he was told without asking questions, and later told him that he believed the king was to be seized in his coach and gave him money to make preparations (pp. 289–294). The third witness, Fisher, testified that on the 8th of February, *i. e.*, before the plan to assassinate the king has been formed, the defendant stated that he would serve his master (the late king) faithfully (p. 294).

Sir Bartholomew Shower, for the prisoner, urged that this proof did not meet the statutory requirement (p. 297):

> * * * the whole of the evidence depends upon the testimony of Mr. Harris and Mr.

> Bertram; and we think they are not two witnesses to one thing, and what they say must be strained, and intended, and presumed, to make evidence of treason * * * and that Lowick after all said he would obey orders: now with submission, my lord, to make that to have relation to the assassination must be by a forced, strained intendment * * *

Lord Chief Justice Holt instructed the jury that while Fisher's testimony was circumstantial and bore only on the defendant's "inclination to the late king" (p. 305), still Harris and Bertram were sufficient witnesses if the jury found from their testimony that it clearly appeared that the defendant was a party to the plan to assassinate King William. Said Holt, L. C. J. (p. 306):

> * * * It is true, we are not to put in the case of a man's life, any forced and violent constructions upon any words or discourses; but if the evidence be plain and clear, though he did not say in express words, that he did design to assassinate or kill the king; yet, if upon the whole discourse that passed between them it appears plainly, clearly, and satisfactorily to you that he did consent and agree to this design, or was engaged in it, here is another witness, I say, to prove him guilty, besides Harris; you are to consider the whole evidence, the subject matter of discourse, and if you are satisfied, I say, that he was engaged in such a design by the proof of

> Bertram, as well as of Harris, then there are two witnesses, which is as much as the law requires.

Lowick's Case holds squarely, therefore, that the testimony of two witnesses is not rendered insufficient because it requires interpretation; all that is necessary is that the matter appear "plainly, clearly, and satisfactorily".

That the test of the sufficiency of the evidence is whether it has a direct, rational, and compelling tendency to establish facts, and not whether it is to be characterized as circumstantial in a technical sense, appears also from *Berwick's Case,* Foster, *Crown Law* 10; 18 How. St. Tr. 367 (1746). There the prisoner was charged with treason for levying war. The testimony of one witness that defendant was seen in the garb of a rebel officer acting as such with the rebel garrison was accepted as sufficient, whereas testimony that he was seen in the uniform of a rebel officer in town was objected to as insufficient and, it seems, rejected. Thereupon two other witnesses were called for the Crown, who testified that, after the surrender of the rebel garrison,

> they went to the Prison where the Officers were confined apart from the Common Men, and took * * * Account of them; that the Prisoner *Berwick* appeared among the Officers, and gave in his Name to them as Lieutenant in the *Manchester* Regiment.

Willes, L. C. J., and Abney, J., held (Foster's *Crown Law*, 11)

> that this Declaration of the Prisoner is not to be considered as a bare *Confession after* the Fact, but as an Evidence of the Fact itself, *viz.* that the Prisoner did appear and take the Rank of a Lieutenant in the Rebel Garrison.

At the time, Foster, J., "doubted whether this Declaration being made *after the Surrender*, can be considered in any other Light than as a Confession after the Fact." But 16 years later, when he published his *Crown Law*, the learned judge was of another opinion. He then said (pp. 243–244):

> I would not in any Thing I have said be understood to Arraign the Proceeding in the Case of *Berwick* before mentioned. He was found in a Prison assigned by the Duke after the Surrender, to the Officers in the Rebel Garrison, *and to none but Officers*, whither he went with the Rest of them. He appeared among them and took the Rank of an Officer. These Facts together with his Declarations, all proved by Two Witnesses, were I think very properly considered by Two Learned Judges not as a bare Confession after the Fact, but as an Evidence upon the Spot and in the very Scene of Action.

That is to say, from Berwick's presence in the officers' part of the prison after the surrender and

from his declaration at that time that he was a lieutenant in a rebel regiment, the jury was allowed to draw the inference—the compelled inference—that he had been in arms with the rebels.

Another case which clearly establishes that eyewitness testimony was not the only kind deemed sufficient to satisfy the St. 7 Will. III is *Rex* v. *Dr. Hensey,* 1 Burr. 642, 19 How. St. Tr. 1342, which was tried before Lord Mansfield in 1758. There the defendant was charged with sending intelligence to the enemy. Only one witness, the postman, was a direct witness to any act by the defendant; he testified that he received letters from the defendant for mailing (19 How. St. Tr. at 1369–1370). Other witnesses testified to finding letters in defendant's bureau at the time of his arrest (pp. 1356–1363), and to the fact that the letters delivered to the postmaster had been intercepted (pp. 1370–1373). Several witnesses who knew defendant's handwriting testified that the intercepted letters and those found in the bureau were in his handwriting (pp. 1365–1368). It is thus evident that the court considered a witness to handwriting sufficient to confirm the direct testimony of the postman to the mailing of the intercepted letters,[20] or accepted as proof of other overt

[20] And see the *Trial of De La Motte*, 21 How. St. Tr. 687, 809, where Buller, J., in 1781 charged a jury that, if the testimony of one witness was confirmed by a letter under the defendant's hand proved by another witness, there would be two sufficient witnesses.

acts the mere fact that incriminating letters in defendant's handwriting were found in his custody.[21]

All these cases, it seems to us, establish that the English courts applying the St. 7 Will. III did not require that evidence be direct in the sense that it be direct eye-witness proof which excluded all process of inference. The test was whether the evidence directly related to the overt act charged, and compelled the inference that that particular act had been committed. The English courts did not accept evidence which merely gave rise to an inference of guilt, but they did accept evidence which directly tended to establish that an act had been committed, even though such evidence might not be eye-witness evidence, or even though eye-witness evidence had to be interpreted in the light of the circumstances to which it related.

—B. *The debates in the Constitutional Convention show that the two-witness requirement was directed against prosecutions inspired by viru-*

[21] That the distinction between "direct" and "circumstantial" recognized by the English courts was a distinction between positive and inferential proof, rather than between eye-witness proof and proof of circumstances, is shown by the rulings on proof of handwriting. If papers were found on a defendant's person or in his custody, proof of similarity of handwriting was good proof (*Rex* v. *Dr. Hensey*, 1 Burr. at 644, 19 How. St. Tr. at 1342–1343), while mere proof of handwriting where letters were not found in the defendant's custody was insufficient (*Rex* v. *Crosby*, 12 How. St. Tr. 1291, 1298 (1695)).

lence and supported by perjury.—The St. 7 Will. III, c. 3, was not unknown to the American bar of 1787. Early colonial legislation had adopted its two-witness provisions, frequently by express reference.[22] It had been cited in American treason trials, in New York as early as 1702 [23] and in Pennsylvania during the Revolutionary War.[24] It was referred to by Blackstone [25] and Hawkins,[26] and formed the subject of Chapter III of Sir Michael Foster's *Discourse on High Treason,* contained in his *Crown Law;* all three works were well known to American lawyers.[27] And there is other convincing historical evidence that the American bar prior to 1787 was aware of the statute.[28] It is in consequence abundantly clear

[22] See Hurst, *Treason in the United States* (1944) 58 Harv. L. Rev. 226, 230–232, 244–245, 272.

[23] *Trial of Colonel Bayard*, 14 How. St. Tr. 471, 506.

[24] *Respublica* v. *Roberts*, 1 Dall. 39 (Pa. 1778); *Respublica* v. *McCarty*, 2 Dall. 86 (Pa. 1781).

[25] 4 Bl. Comm. *356–357.

[26] 2 *Pleas of the Crown* (4th ed. 1762) 257–259.

[27] Foster's *Crown Law* had been cited in the Pennsylvania treason trials of 1778, in which James Wilson, later a member of the Constitutional Convention, had been of counsel. *Respublica* v. *Malin*, 1 Dall. 33, 34; *Respublica* v. *Carlisle*, 1 Dall. 35, 36; *Respublica* v. *Roberts*, 1 Dall. 39, 40. And see the citations to Foster in *Respublica* v. *McCarty*, 2 Dall. 86 (Pa. 1781) and *Respublica* v. *Weidle*, 2 Dall. 88 (Pa. 1781) (misprision of treason). Hawkins had been cited in the *Malin* and *Roberts* cases.

[28] Jefferson referred to both the statute and Foster's treatise in 1778. See Hurst, *Treason in the United States* (1944) 58 Harv. L. Rev. 226, 252–253. James Wilson has already been mentioned above, note 27; see also Hurst, *supra*, at 247–248.

that both the draft provision as to two-witness proof submitted to the Convention as well as the requirement finally adopted had their origin, not in any "system of trial not rational in its processes at all,"[29] but in the familiar terms of the St. 7 Will. III which was the colonists' birthright, and whose provisions had been in and out of English law since 1547.[30]

As originally presented to the Convention on August 20, 1787, Article VII, Sec. 2, of the draft provided, in the respect now pertinent (2 Farrand, *Records of the Federal Convention*, 345):

> No person shall be convicted of treason, unless on the testimony of two witnesses.

The discussion covered this and other clauses of the draft; the first reference to the evidentiary requirements appears at page 346:

> Mr. Dickenson thought the addition of "giving aid & comfort" unnecessary & improper; being too vague and extending too far—He wished to know what was meant by the "testimony of two witnesses," whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt-act ought to be expressed as essential in the case.

---

[29] *United States* v. *Robinson*, 259 Fed. 685, 691 (S. D. N. Y.).

[30] See 7 Wigmore, *Evidence*, § 2036, pp. 264–268. The first statutory two-witness provision was the St. 1 Edw. VI, c. 12, § 22.

> Doct Johnson considered "giving aid & comfort" as explanatory of "adhering" & that something should be inserted in the definition concerning overt-acts. * * *

Other discussion and three motions followed. Next (2 Farrand, 348)—

> It was then moved to insert after "two witnesses" the words "to the same overt act."
>
> Doct Franklin wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.
>
> Mr. Wilson. Much may be said on both sides. Treason may sometimes be practiced in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.

Without further reported discussion, the vote was taken and the amendment carried, by 8 States to 3.

The foregoing represents the sum-total of the reported discussion on the two-witness provision. As Dean Wigmore pointed out, *op. cit. supra*, § 2037 at p. 270, "the opportunity of detecting the falsity of the testimony, by sequestering the two witnesses * * * and exposing their variance in details, is wholly destroyed by permitting them to speak to different acts." Therein lies the real value of the change made by the Constitution in the provision taken from the St. 7 Will. III—although, in respect of indictments contain-

ing only a single overt act, the requirements of proof remained quite the same.

There is nothing in the debates about "direct" as against "circumstantial" testimony, and nothing indicating an intent to require that proof of the overt act be more direct than was required to establish the crime "plainly, clearly, and satisfactorily." Neither the English cases nor the English texts insisted on complete eye-witness accounts such as excluded even compelled inferences. And while a number of early colonial statutes had imposed a two-witness requirement for all capital offenses when the English law did not do so,[31] even the earliest laws of New Haven and Plymouth deemed the account of two witnesses sufficient "though they did not together see, nor heare, and so witnesse to the same individuall, any particular Act, in reference to those circumstances of time, and place."[32] There is no reason to believe, therefore, that when the Framers provided for the testimony of two witnesses to the same overt act, they intended to affect anything beyond the quantitative requirement.

Moreover, it should not be overlooked, in appraising the purpose of the two-witness require-

[31] See Hurst, *Treason in the United States* (1944) 58 Harv. L. Rev. 226, 243–244, quoting, *inter alia*, the New Haven Laws of 1656 and the Plymouth Laws of 1671.

[32] *Supra*, note 31. The Plymouth Laws added, "Provided the Bench and Jury be satisfied with such testimony."

ment in the light of Dr. Franklin's indorsement, that in 1787 and for nearly a hundred years thereafter, the defendant in a criminal trial was not a competent witness on his own behalf. See 2 Wigmore, *Evidence* (3d ed. 1940), § 579. The disqualification was not removed in federal criminal proceedings until 1878 (Act of March 16, 1878, c. 37, 20 Stat. 30, 28 U. S. C. 632), nor in the English courts generally until the Criminal Evidence Act in 1898, St. 61 & 62 Vict., c. 36. All that the accused had, in some jurisdictions, was the privilege of making an unsworn statement to the jury. 2 Wigmore, *op. cit.*, §.579, at p. 702. Consequently, the accused being unable to defend himself under oath, the two-witness rule protected him against virulent prosecutions supported by perjured testimony.

C. *The two-witness requirement in the Constitution is construed by the early American decisions precisely as that requirement was construed by the English courts before 1776.*—The Constitution, then, provides that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act." We have shown that the debates throw no light on whether the required testimony be circumstantial or direct or indeed on what would be the outside limits of either category. We submit, therefore, that the only proper standard for two-witness testimony is the one which had been established as a matter of English law prior to 1776 in cases

where the two-witness requirement was applicable. Such an approach is the one used by Chief Justice Marshall in the *Burr* case when he was required to ascertain the meaning of "levying War." He said (*United States* v. *Burr*, Fed. Case No. 14693, 25 Fed. Cas. at 159–160, 2 Robertson's Report, 402–403 (C. C. D. Va. 1807)):

> But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term "levying war" is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edw. III. from which it was borrowed. It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior

> authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect.

Mr. Justice Iredell, presiding at the first trial of *Fries*, had earlier said substantially the same thing (*Case of Fries*, Fed. Case No. 5126, 9 Fed. Cas. at 911–912 (C. C. D. Pa., 1799):

> * * * When this constitution was made, it was in the power of those who formed it either to define treason or not, or, if they thought proper to do so, to do it in what manner they chose, in which they might have followed the example of the country whence their ancestors came, to which they were accustomed, and in which they were most experienced in their own several states, where the crime of levying war was denominated treason. I believe

this has been generally followed through the states: in some I know it has. This term of levying war is an English expression, borrowed from the statute of Edward III; but, notwithstanding this, the principal provisions respecting treason are taken from an act of the British parliament in the reign of William III, which is principally calculated to guard the independence of the court against the power of the crown, and the prisoner against his prosecutors. Now, I must confess, as these able and learned framers of our constitution borrowed the act, in terms, from the British statute alone, an authority with which they were familiar, that they certainly at least meant that the English authorities and definition of those terms should be much respected. Those gentlemen knew as well as any counsel at the bar, the danger of constructive treasons: they knew how to guard themselves against the bad times of English history, and were equally acquainted with the better and more modern decisions. Would it not have been natural for men so able, so wise, so cautious, of their liberties, had they entertained a doubt of their insufficiency, to have introduced some new guards, some new interpretations, and not to have left us in later times in the dark, exposed to so much danger as the gentlemen of the bar apprehend? Gentlemen who know anything of that country, know that arbitrary times have existed, and also that a number of decisions have taken

> place since that period. I do not believe that any judge since the revolution in England has ever considered that he was bound to follow every arbitrary example of the English courts, or the crown laws which had taken place in dark ages. * * *

Even more significant, perhaps, are the comments on the treason clause made by James Wilson, also a Justice of this Court. He was, as has been noted, a member of the Constitutional Convention; he may well have been the author and draftsman of the treason clause;[33] here is what he said about the constitutional definition of the offense in law lectures delivered in 1790 and 1791:

> * * * This single sentence comprehends our whole of national treason; and, as I mentioned before, is transcribed from a part of the statute of Edward the third. By those who proposed the national constitution, this was done, that, in a subject so essentially interesting to each and to all, not a single expression should be introduced, but such as could show in its favour, that it was recommended by the mature experience, and ascertained by the legal interpretation, of numerous revolving centuries.[34]

Wilson was a member of the Constitutional Convention, Marshall and Iredell were each members of the ratifying conventions in their respec-

[33] See, Hurst, *Treason in the United States* (1945) 58 Harv. L. Rev. at 404–406.

[34] 3 *Works of James Wilson* (1804) 99–100.

tive States; surely these judges are reliable guides to the proper construction of the Constitutional provision. It is significant that there is no expression by any judge whose adult life was contemporaneous with the adoption of the Constitution which suggests that the English interpretations of such of the antecedent statutory provisions as were carried into the fundamental law are to be rejected;[36] that the first expression to

[35] 1 Beveridge, *The Life of John Marshall* (1916) 357 *et seq.*, and see 3 Elliott's *Debates*, *passim*. For Iredell, see 9 *Dict. Am. Biog.* 492, and 4 Elliott's *Debates*, *passim*.

[36] Peters, D. J., *semble accord* with Marshall, Iredell, and Wilson in *Case of Fries*, *supra*, 9 Fed. Cas. at 909 (C. C. D. Pa. 1799). Livingston, J., who had been admitted to the bar in New York in 1783 (11 *Dict. Am. Biog.* 312–313) avoided the question in 1808 (a possible reaction to the then recent Chase impeachment, according to Hurst, *Treason in the United States* (1945) 58 Harv. L. Rev. 806, 812, n. 217). See *United States* v. *Hoxie*, 1 Paine 265, 270–271, Fed. Case No. 15407, 26 Fed. Cas. at 398 (C. C. D. Vt. 1808):

> In taking notice of precedents, set by British tribunals, the Court does not mean to give any opinion on their binding effect in the United States; or discuss a question which has been much agitated—whether, by the use of these terms, it was intended to adopt the technical meaning which they had already received in England: or whether, considering treason as a new offence against a newly created government, the constitution on this point was to be interpreted by itself, without reference to, or with the aid of any common law decisions whatever? These questions will be left unconsidered—a decision of them now not being thought material. For, if the Court does not greatly err, no construction in England, and certainly none in America, has yet carried this doctrine the length to which we are at present expected to go.

the contrary dates from 1861;[37] and that that is the only expression to the contrary until 1945. The other judicial utterances all echo the views of those who participated in the drafting and in the ratification of the Constitution.[38] And it would be difficult to maintain, we submit, that lawyers of today, a hundred and sixty years later, are better able to assert what the men of 1787 really had in mind than they themselves were, when, in 1790 and 1799 and 1807, they spoke upon the subject.[39]

Certain it is, in any event, that the first two American decisions on the nature of the required two-witness testimony, which date from 1795 and 1807—and they are the last ones on the point for

---

[37] *Charge to Grand Jury*, 5 Blatchf. 549, 550, Fed. Case No. 18271, 30 Fed. Cas. at 1035 (C. C. S. D. N. Y.) (Nelson, J.).

[38] *Charge to Grand Jury*, 2 Wall. Jr. 134, 136, Fed. Case No. 18276, 30 Fed. Cas. at 1048 (C. C. E. D. Pa. 1851) (Kane, D. J.); *Charge to Grand Jury*, 2 Curt. 630, 633, Fed. Case No. 18269, 30 Fed. Cas. at 1025 (C. C. D. Mass. 1851) (Curtis, J.); *Charge to Grand Jury*, 1 Spr. 602, 603, Fed. Case No. 18273, 30 Fed. Cas. at 1039 (D. Mass. 1861) (Sprague, D. J.); *United States* v. *Greiner*, 4 Phila. 396, 399–400, 1 Cadw. Cas. 448, 453–454, Fed. Case No. 15262, 26 Fed. Cas. at 38 (E. D. Pa. 1861) (Cadwalader, D. J.); *United States* v. *Greathouse*, 4 Sawy. 457, 465–466, Fed. Case No. 15254, 26 Fed. Cas. at 21 (C. C. N. D. Calif. 1863) (Field, J.); *Druecker* v. *Salomon*, 21 Wis. 621, 626 (1867); *United States* v. *Cramer*, 137 F. 2d 888, 894 (C. C. A. 2, 1943). *Accord:* 2 Story, *Commentaries on the Constitution* (2d ed. 1851) 540.

[39] Compare Hurst, *Treason in the United States* (1945) 58 Harv. L. Rev. 806, 811–812; Hurst, *The Historic Background of the Treason Clause of the United States Constitution* (1945) 6 Fed. Bar Ass'n J. 305.

over a century, until 1919—those decisions in fact apply the standards developed by Holt and Foster and Lord Mansfield under the St. 7 Will. III. They support the conclusion that the necessity for some interpretation does not render the testimony insufficient under the constitutional requirement.

In *United States* v. *Mitchell*, 2 Dall. 348 (C. C. D. Pa.), one of the cases arising out of the Whisky Insurrection of 1794, the defendant was indicted for treason—levying war—by assembling at Couche's fort and then proceeding to set fire to General Neville's house. There were two witnesses to the fact that the defendant was at the fort, but only one to the fact that he was at the burning of the General's house, and one to the fact that he was seen marching to the house. Mr. Justice Paterson thought that the better view of the case was that the meeting at the fort and the burning of the house together constituted one overt act of treason, and that the whole act was sufficiently proved by the testimony that the defendant was at the fort and that one person saw him march from thence and another saw him at the conflagration at the house. He said, charging the jury (2 Dall. at 356):

> * * * It is said, that no act of treason was committed at Couche's Fort; and that however treasonable the proceedings at Gen. Neville's may have been, there are not two witnesses who prove that the prisoner

was there. Of the *overt* act of treason, there must, undoubtedly, be proof by two witnesses; and it is equally clear, that the intention and the act, the will and the deed, must concur; for a bare conspiracy is not treason. But let us consider the prisoner's conduct, in a regular and connected course. He is proved by a competent number of witnesses, to have been at Couche's Fort. At Couche's Fort, the conspiracy was formed, for attacking Gen. Neville's house; and the prisoner was actually passed on the march thither. Now, in Foster 213, the very act of marching is considered as carrying the traitorous intention into effect; and the jury (who will sometimes find the most positive testimony contradicted by circumstances which carry irresistible conviction to the mind) will consider how far this aids the doubtful language of the second witness, even as to the fact of the prisoner's being at Gen. Neville's house.

On the personal motives and conduct of the prisoner, it would be superfluous to make a particular commentary. He was armed, he was a volunteer, he was a party to the various consultations of the insurgents; and in every scene of the insurrection, from the assembly at Couche's Fort to the day prescribed for submission to the government, he makes a conspicuous appearance. His attendance, armed, at Braddock's field, would of itself amount to treason, if his design was treasonable.

> Upon the whole, whether the conspiracy at Couche's Fort may of itself be deemed treason; or, the conspiracy there, and the proceedings at Gen. Neville's house, are considered as one act (which is, perhaps, the true light to view the subject in), the prisoner must be pronounced guilty. * * *

In other words, Paterson, J., in effect adopted the rule that the two-witness requirement is satisfied if each witness testifies to complementary parts of a continuous act.

The next case, *Aaron Burr's* trial in 1807, Fed. Case No. 14693, does not differ from the foregoing save on its facts. It is true that Chief Justice Marshall said (25 Fed. Cas. at 176, 2 Robertson's Report 436), "No presumptive evidence, no facts from which presence may be conjectured or inferred will satisfy the Constitution and the law." But he was dealing with a situation where there was no proof at all of Burr's presence at the meeting which was charged as the overt act of treason. He had earlier noted (25 Fed. Cas. at 172, 2 Robertson's Report at 429), "There is not only no evidence that the accused was of the particular party which assembled on Blannerhassett's island; but the whole evidence shows he was not of that party." The *Mitchell* case he distinguished on its facts. The judge there, he pointed out (25 Fed. Cas. at 173, 2 Robertson's Report at 431),

> proceeded to consider the meeting at Couch's, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses to have been in that transaction, to have taken an active part in it; and the judge declared it to be unnecessary that all should have seen him at the same time and place.

If the proof in the *Burr* case had been the same as in the *Mitchell* case, then, said the Chief Justice, "the decision would have been the same."

Consequently, *United States* v. *Burr* is not authority for the proposition that no circumstantial evidence satisfies the constitutional requirement, nor, certainly, for a rule that the testimony of witnesses to different parts of the same overt act cannot be tacked. It holds only that a man cannot be made constructively present at the scene of an overt act when he is shown not to have been actually present. It rejects circumstantial evidence in the sense of conjectural evidence, but it approves the *Mitchell* case which permits normal and compelling inferences to be drawn from the corroborating evidence of several witnesses. For the rule of the *Mitchell* case, while it required the jury to infer from two-witness testimony of being at the fort, and one-witness testimony of being on the marsh, and one-witness testimony of being at the fire, the

conclusion that Mitchell was present throughout—which is what we mean by a compelled inference—still protected the defendant from a prosecution inspired by virulence and supported by perjury. To revert to the language of Holt, L. C. J., the matter appeared "plainly, clearly, and satisfactorily."

For 112 years there is no American treason case dealing with the two-witness requirement. Then, in 1919, come two decisions from the same district which follow each other in the same volume of the reports.

In the first, *United States* v. *Fricke*, 259 Fed. 673 (S. D. N. Y.), the problem was the familiar one of the *Mitchell* case, whether the testimony of each of two witnesses who testified to complementary parts of a continuous transaction satisfied the constitutional requirement. Judge Mayer held that it did, saying (259 Fed. at 677):

> Where the overt act is single, continuous, and composite, made up of, or proved by, several circumstances, and passing through several stages, it is not necessary in order to satisfy the provisions of the Constitution requiring two witnesses to an overt act, that there should be two witnesses to each circumstance at each stage, as distinguished from the necessary proof of two witnesses to an act other than continuous and composite.

> That means this: If one of the overt acts, we will say, was as in this case the sending of a telephone message, and you have the testimony of the telephone operator who received the message for transmission, and the testimony of the person to whom the message was transmitted, there are the stages of one transaction proved by two witnesses, as the one witness was at one end of the telephone and the other witness at another.

The other case, *United States* v. *Robinson*, 259 Fed. 685 (S. D. N. Y.), dealt largely with other matters. Insofar as it requires that the overt act in treason itself manifest the treasonable intent; it is of course not law. *Cramer* v. *United States*, 325 U. S. 1, 34–35. Its analysis of the history and rationale of the two-witness requirement is, at the very least, unconvincing.[40] And it badly mis-cites the authorities relied on for the proposition that it has "always been necessary to produce direct, and not enough to produce circumstantial, proof", 259 Fed. at 691, relying on *Rex* v. *Lowick*, 13 How. St. Tr. 267, 305, and *Burr's Case*, 25 Fed. Cas. 55, 176.

The page citation to the *Trial of Lowick* is to that portion of Lord Holt's charge which dismisses Fisher's testimony as circumstantial. See

[40] See the comments on *United States* v. *Robinson* of perhaps the most thoroughly informed American scholar on the subject of treason. Hurst, *Treason in the United States* (1945) 58 Harv. L. Rev. 806 at 837, n. 293, and at 845, n. 316.

p. 62, *supra*. There is not the slightest awareness in the *Robinson* opinion of the compelled-inference versus eye-witness problem which was raised by Sir B. Shower for the defense and disposed of by Lord Holt's charge. See *supra*, pp. 61–63. And the reference to *Burr*'s case is to the quotation about presumptive evidence, *supra*, p. 80, with no mention or even indication of Chief Justice Marshall's discussion and approval of the *Mitchell* decision, although the *Mitchell* case is discussed later on in the opinion, 259 Fed. at 693.

In the *Robinson* case, Judge Hand was dealing with a situation where only one witness testified to the purpose which gave the color of treason to overt acts which were not in themselves acts of aid and comfort to the enemy, and where the other evidence tending to show the character of the overt acts consisted of separate circumstances not directly related to the overt acts charged. There the overt act which was deemed sufficient, the third overt act of the third count (259 Fed. at 686 and 690), charged that the defendant embarked from Rotterdam for New York carrying messages to agents of the German Government. The act of sailing was directly proved by two witnesses, but only one witness testified to the purpose of the sailing. The other evidence relied upon to show the purpose was the fact that the defendant kept himself in hiding and that he received letters from Europe in code. It was on these facts that Judge Hand concluded (259 Fed. at 694):

> * * * it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act, but, if so, each bit must have the support of two oaths; on that I say nothing. In the case of none of the overt acts at bar was the necessary evidence produced. The gravamen of the charge depended for direct support on Victorica alone. For the rest, the case rested upon circumstantial evidence, which, while well-nigh conclusive in fact, was not direct as required.

It is to be noted that none of the circumstances testified to by the witnesses in the *Robinson* case related directly to the doing of the particular overt act charged, and, while the collection of circumstances tended strongly to show a generally guilty intent, they did not tend specifically to show that the defendant was in fact carrying messages when he took the trip charged as an overt act. The *Robinson* case did not discuss the type of evidence involved in the cases of *Mitchell* and *Fricke*. It did not reject as insufficient, for instance, evidence that the defendant had the messages when he boarded the vessel and evidence that the messages were in his luggage when he reached his destination.

Apart from the circumstances that *United States* v. *Robinson* did not deal with the kind of evidence here in question, evidence which directly tended to establish the *doing* of an overt act, the case is the only reasoned decision which even ap-

pears to be contrary to our position here.[41] And, apart from the circumstance that it is not law as to the substantive aspects of treason[42] and is of doubtful authority on the history of the offense,[43] its treatment of the earlier authorities as to the evidentiary requirement militates against accord-

[41] Insofar as *Stephan* v. *United States*, 133 F. 2d 87 (C. C. A. 6), certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423, considers questions relating to the sufficiency of the evidence to support the overt acts there involved (133 F. 2d at 92–94), the decision either follows the *Robinson* case without further study or analysis, or else deals with overt acts which are clearly unsupported by two-witness testimony on any theory.

We do not stop to consider the possible application of all the language of the *Cramer* opinion, since the precise problem now involved here was not there considered. See pp. 95–96, *infra*. As this Court has frequently said, see *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 626–627; and, most recently, *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132–133, the language of its opinions is to be read in the light of the facts of the case under discussion.

[42] Because it required that the overt act in treason itself manifest the treasonable intent. *Contra: Cramer* v. *United States*, 325 U. S. at 34–35.

[43] The weakest aspect of Judge Hand's historical discussion is the circumstance that, in seeking the meaning of what was written by the Constitutional Convention in 1787, he explores the intricacies of the canon law. Even so, he overlooks that the canon law held the two-witness requirement to be met when two or more persons testified to different acts which were coherent parts of the whole, either by complementing each other or by tending to establish the same fact.

Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, and Honorary Consultant in Canon Law, Library of Congress, in

ing it the weight which would otherwise attach its author's judicial utterances. For the learning of *Rex* v. *Lowick* and *Burr's Case* is the precise opposite of what Judge Hand ascribes to them: they hold that evidence which though requiring interpretation conclusively and compellingly points to the doing of the act charged, i. e., "circumstantial" evidence which is in fact well-nigh conclusive, fully satisfies the two-witness requirement. *Rex* v. *Lowick* rejects inconclusive conjecture; *Burr's Case* rejects assumptions which the other evidence affirmatively disproved.

---

his paper, *The Two-Witness Requirement in Canon Law*, says (Appendix to U. S. Brief in the *Cramer* case, pp. 42–43):

> * * * A "cumulative" difference is had where two or more persons testify to different acts *which are coherent parts or phases of a whole*, by complementing each other or by tending towards the same end. E. g., witness I has seen the defendant loading a gun and aiming, witness II has heard the detonation of the shot: both together may sufficiently prove the act of shooting. Or witness I has seen the plaintiff plowing a field, witness II has seen him sowing some days later, witness III has seen him still later reaping the harvest: this may be sufficient evidence that the plaintiff was in bodily possession of the field. In other words, several "singular" witnesses in the case of a merely "cumulative" difference are considered by Canon law as sufficiently complying with the two-witnesses rule, except where any factual or logical link in the chain of their observations is missing. (See Schmalzgrueber, *Jus ecclesiasticum*, book II, part III, title 21, §§ 105–6; Cardinal M. Lega, *De iudiciis ecclesiasticis*, vol. I, no. 481; but for cautious application of the doctrine in criminal cases, *id.* vol. IV, num. 222.)

Neither rejects evidence having a direct and rational relationship to the fact being proved. And neither requires complete eye-witness testimony by two witnesses to every element of the overt act.

D. *The testimony supporting the overt acts here fully meets the constitutional requirement.*—Having reviewed the terms of Constitutional provision in the light of "their origin and the line of their growth", we are now ready to examine the conclusion of the court below (R. 887–901) that all twelve of the overt acts submitted to the jury were proved by the testimony of two witnesses as the Constitution requires.

(1) *Overt acts 10 and 11—assisting Herbert to obtain employment.*—As we have shown in the Statement, *supra*, pp. 10–13, at least two witnesses testified to the fact that petitioner, with Herbert, called upon Grunau and Koch, respectively; and that Herbert, in petitioner's presence, asked each of these men for employment in the Simpson Optical Company and gave a false account of his absence from the United States. Petitioner's attack on the sufficiency of the evidence to establish these two overt acts is not really based on any failure to meet the two-witness requirement, but on his contention (Pet. 31) that his presence did not constitute assistance to Herbert. However, as we have pointed out above in some detail, see pp. 49–52, petitioner's presence at these interviews was in fact an act of direct assistance to Herbert.

(2) *Overt acts 13–16—the arrangements for and purchase of the automobile for Herbert.*—Petitioner does not deny that there was testimony of two witnesses that he accompanied Herbert to the agency on June 23 (overt act 13; see Statement, *supra*, p. 20), or to the fact that he made the purchase arrangements and the initial payment on June 23 (overt act 14; *supra*, p. 21), or to the fact that he accompanied Herbert to the Motor Sales Agency on July 24 (overt act 15, *supra*, p. 21). He does challenge the sufficiency of the evidence to establish by two witnesses the fact that he actually made the final payment on the car (overt act 16; Pet. 29–30).

Farrell, the sales agent, testified that, on the evening of June 24, petitioner came to the agency, with Herbert, that petitioner paid $405 on the purchase price in cash (including three fifty-dollar bills), signed a note for the balance due, and executed the usual finance contract (R. 306–309). Vinson, the manager of the agency, testified that he saw petitioner and Herbert come in that evening, and that he received the money and the note signed by petitioner (R. 315–316). Vinson's itemization of the currency which he received that evening corresponded with Farrell's testimony as to the denomination of the currency he had received from petitioner; both agreed that it was in fives, tens, and twenties, with three fifty-dollar bills (R. 306, 316).

This, we submit, is direct testimony by two witnesses that petitioner completed the purchase of the automobile as alleged. The matter appears "plainly, clearly, and satisfactorily." As we have shown, American decisions by judges who were participants in the ratification of the Constitution make it clear that the requirement that there be two witnesses to the same overt act does not mean that the two witnesses must observe any particular action at exactly the same point at exactly the same time. *United States* v. *Mitchell*, 2 Dall. 348; *United States* v. *Burr*, Fed. Case No. 14693, both *supra*. Here the fact to be proved was that petitioner completed the purchase of the automobile. Farrell's testimony that petitioner signed the note and handed over currency of particular denominations, and Vinson's testimony that he saw petitioner at the agency and received both the note and the money, which was in bills of precisely the same denomination, directly tended to establish that fact. Insofar as mental processes contribute to the conclusion, they are inferences which compel that result. No other inferences are possible. There is no room whatever on this evidence for speculation or conjecture.

Petitioner also contends (Pet. 30) that Farrell was the only direct witness to the fact that the car was purchased for Herbert. But this contention overlooks the testimony of the witness Robe, an F. B. I. agent, that he observed peti-

tioner and Herbert drive to the motor agency in petitioner's automobile, a Plymouth; that he "saw Herbert Haupt leave the Warner Motor Sales, driving the 1941 Pontiac coupe," which had just been purchased, (R. 449), and that he observed Herbert driving to and from specified places in the Pontiac during the few days prior to his arrest (R. 449–451). Another F. B. I. agent, Berg, also saw Herbert drive the Pontiac on several days prior to his arrest (R. 457–458). This evidence that Herbert assumed dominion over the Pontiac automobile immediately upon completion of the purchase, and that he had this car until he was apprehended, sufficiently shows, together with Farrell's testimony, that the automobile was acquired for Herbert.

None of the reasons advanced for the adoption of the two-witness rule, whether in the common law, the canon law, or the Constitution itself, militates against reliance on different witnesses in support of different parts of complex overt acts, just so long as each material part of the act is proved by two witnesses. In view of the ruling in the *Cramer* case that an overt act of treason must itself be an act of aid and comfort, it is evident that an act sufficient to meet that test will frequently be a complex one, and will require more than two single witnesses to establish all its elements. But, having regard to the purpose of the Constitutional restriction—"prosecutions for treason were generally virulent; and perjury

too easily made use of against innocence"—it is obvious that the possibility of conviction on perjured testimony is far less when the prosecution is required to rely on three or four witnesses in order to establish a single overt act rather than just on two.

(3) *Overt acts 12, 17, 20–23—harboring and sheltering Herbert.*—Petitioner does not challenge the sufficiency of the evidence to establish overt act 17, which charged that he harbored and sheltered Herbert on June 23, 1942. As to the day there was, in addition to the testimony of the F. B. I. agents who saw Herbert going in and out of the building, sometimes alone and sometimes with his mother or petitioner, the testimony of two witnesses—Zermer and Mrs. Saure (then Miss Melind)—who were actually in petitioner's apartment and observed Herbert there with petitioner. See p. 17, *supra*. Petitioner contends however (Pet. 25–28), that the other overt acts, of harboring and sheltering Herbert on other days, were not proved by direct evidence as required, since on no other occasion did any witnesses actually see Herbert in petitioner's apartment.

The proof as to the other days was as follows: By the direct testimony of two or more witnesses who lived in the building, it was established that petitioner and his wife lived in the third floor front apartment at 2234 N. Fremont Street,

Chicago, Illinois, and that the sole entrance to that apartment was through the front entrance to the building. These same witnesses testified that they lived in the only other two apartments which could be reached through the front door and that Herbert at no time resided in their apartments. See p. 14, *supra*. By direct testimony of two or more F. B. I. agents, it was established that on each of the days in question Herbert on numerous occasions entered and left the building; that when he entered late in the evening, the lights in the third floor front apartment were extinguished within a few minutes and that he did not leave the building until the following day; that he always returned to the building at the close of the day; that on several occasions Herbert entered the building wearing described clothing and that when he thereafter left the building, he was wearing other clothing; that on numerous specified occasions Herbert entered and left the building in company with both or one of his parents; and that on specified occasions Herbert accompanied petitioner and Mrs. Haupt from the Haupt home to the homes of their friends. See *supra*, pp. 14–20.

Thus there was, throughout, direct observation by two witnesses of petitioner and of the enemy whom he was accused of aiding, at the time and at the location at which aid is alleged to have been given. There was also direct testimony by

two witnesses as to the physical surroundings in which petitioner and the enemy whom he aided moved. All the evidence directly related to the act in question. There was here no attempt to prove simply a number of separate circumstances, in themselves unrelated either to the time or place of the act charged, from which it was sought to infer the doing of the act. Here the competent facts, each directly observed by two witnesses, leave nothing to conjecture, and compellingly and inescapably establish that petitioner was harboring Herbert at the time and place the observations were made. This, we submit, fully satisfies the constitutional requirement that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act." *United States v. Mitchell*, 2 Dall. 348; *United States* v. *Burr*, Fed. Case No. 14693, both *supra*.

The trial judge went at least as far as the Constitution required when he charged the jury that an overt act must be proved by the testimony of "two direct witnesses" (Instructions Nos. 43, 44, 48, 49, and 50; R. 36, 39). He specifically told the jury that overt acts not proved by two witnesses could not be made the basis of a conviction even if the jury believed beyond a reasonable doubt that such acts were performed (No. 49, R. 39). He rejected petitioner's requests for a definition of witnesses as persons who "actually saw the commission of the particular overt act"

(D–1 and D–2, R. 726; Pet. 77–78)." We submit that his instructions were entirely correct.

The *Cramer* case, of course, dealt with an entirely different kind of situation. There the overt act of meeting with an enemy agent, proved by two witnesses, was held insufficient to establish that the act of meeting gave aid and comfort to the enemy. The basis of the ruling as to the requirement of direct testimony was that, in order to show the aid-and-comfort character of the overt act, two witnesses to that character were also necessary. It was in that connection that the Court said (325 U. S. at 34–35), "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses." It was in the same connection that the Court said (325 U. S. at 38), "* * * the whole purpose of the constitutional provision is to make sure that treason conviction shall rest on direct proof of two witnesses and not on even a little imagination. And without the use of some imagination it is difficult to perceive any advantage which this

---

" See the colloquy between court and counsel (R. 688):

"The COURT. I have said there must be two direct witnesses to the same act.

"Mr. BERTRAM. Is there anything wrong or objectionable about putting in who actually saw the actual commission?

"The COURT. That is something more than the statute requires. I have said direct witnesses. I have limited the language with the word 'direct' so I will leave that there."

meeting afforded to Thiel and Kerling as enemies or how it strengthened Germany or weakened the United States in any way whatever." All the discussion related to the *quality* of the overt acts as acts of aid and comfort, not to the sufficiency of the two-witness proof relied upon to establish the *doing* of the acts. Hence the distinctions taken in the *Cramer* opinion between "direct" and "circumstantial" evidence must be read in the light of the very different facts there under discussion.

Here, on the other hand, not a whit of imagination is necessary to establish the doing of the acts charged; only one inference is possible from the evidence which has been adduced. Quite to the contrary, a very substantial amount of imagination is necessary to establish that petitioner did not shelter Herbert on the five days on which no witnesses were inside the apartment, or to prove that petitioner did not pay to Vinson the $405 which the latter turned over to Farrell.

Other instances of conclusive proof by the testimony of two "direct" witnesses who were not eye-witnesses can readily be supposed, examples where such observation conclusively establishes the fact in question. But we think there is no need either to extend the discussion or to conjure up situations additional to those actually under review. We repeat, here the facts, each directly observed by two witnesses, compellingly and inescapably establish, without any resort to conjecture or

speculation, that petitioner did each of the overt acts alleged.

This Court has had occasion to remark that the provision in the Philippine bill of rights "giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." *Paraiso* v. *United States,* 207 U. S. 368, 372. Similarly, a provision in the Constitution requiring "the Testimony of two Witnesses", which says nothing about "direct testimony", should not, through refinements on the concept of "direct testimony", be twisted to such a point that only witnesses who were in the accused's presence are competent to testify against him. Nothing in the two-witness requirement of the treason clause incorporates the tedious learning which disqualifies attesting witnesses to a will who are momentarily out of the testator's presence.[45]

There is nothing in the constitutional provision, and nothing in its origin or the line of its growth, which requires either that each witness be an eyewitness, or that each testify to every single element of the overt act charged so as wholly to ex-

---

[45] E. g., *Hindmarsh* v. *Charlton,* 8 H. L. C. 160; *Goods of Colman,* 3 Curt. Eccl. 118; *Norton* v. *Bazett,* D. & Sw. 259.

clude all process of reasoning. It is sufficient that the testimony directly relate to the act charged at the time and place that act was committed. There is no necessity now to delimit the outer limits of what will constitute acceptable proof. Here the testimony left nothing to conjecture, and compelled the inference that the acts charged had been done.

To hold that the overt acts in this case were not proved by two witnesses as required by the Constitution would go far towards justifying the stricture that jurisprudence is the art of being methodically ignorant of what everyone knows, would do a lasting disservice to the administration of criminal justice, and would pervert the substance of a basic Constitutional guarantee into a ritualistic abracadabra wholly unrelated to its purpose.

III. EVEN IF SOME OF THE OVERT ACTS SHOULD BE DEEMED NOT TO HAVE BEEN PROVED BY TWO SUFFICIENT WITNESSES, THE JUDGMENT OF CONVICTION MUST STILL BE AFFIRMED

Even if the arguments made in the preceding point should be rejected, and it were held that some of the overt acts submitted to the jury were not proved by the kind of two-witness proof which is required, as for example on the standards applied, though without real support from the cases, by the dissenting judge below (R. 923–926), there are still enough undisputed overt acts left in this

case, in respect of proof by two witnesses, to require an affirmance of the conviction. This result follows both from the undisputed rule in treason cases generally as well as from the particular circumstances and posture of the present case. On either footing, there is no basis for setting aside the conviction because of the failure to establish the sufficiency of some of the overt acts which were submitted to the jury.

A. *As a matter of the substantive law of treason, one overt act, proved by the testimony of two witnesses, is sufficient (there being also present the requisite intent) to sustain a judgment of conviction, even though additional overt acts alleged in the indictment are not so proved.*— There can be no doubt that a person who, with intent to betray, commits a single act of aid and comfort to the enemy, and who is proved to have committed such act by the testimony of two sufficient witnesses, may properly be convicted of treason. This proposition is disputed neither by the petitioner nor by the dissenting judge below. We are therefore unable to appreciate the basis of their objections to Instructions 51 and 52 of the trial judge's charge (R. 39), in which the jury were told that petitioner was guilty if they found that, with intent to betray, he committed any one of the overt acts submitted for their consideration, and found also that such overt act had been proved by the testimony of two direct witnesses.

The elements of the crime of treason are not changed because the indictment alleges more than one overt act. And a person who is shown by proper proof to have committed one act of treason is not entitled to go free merely because he did not commit another act as well. As a matter of definition, treason is established by two-witness proof of any one overt act together with any sufficient proof of the requisite intent. It was therefore proper to instruct the jury that they could convict on a finding that one overt act had been established by two witnesses.

Such has always been the law, in an unbroken line of authority from the early English cases prior to 1776 down to the present day. For the convenience of the Court, we set forth the earlier decisions and text-writers' comments in detail.

Trial of the Regicides, 5 How. St. Tr. 947, 1033 (1660), *per* Sir Orlando Bridgman, L. C. B.:

> Then the first overt-act is their meeting, consulting, and proposing to put the king to death. The second is more open; namely, their sitting together, and assuming an authority to put the king to death. The third is sentencing the king. And I must tell you, that any one of these acts prove the indictment. If you find him guilty but of any one of them, either consulting, proposing, sitting, or sentencing (though there is full proof for all), yet notwithstanding you ought to find the indictment.

Trial of Robert Lowick, 13 How. St. Tr. 267, 277 (1696), *per* Sir John Holt, L. C. J.:

> Suppose you lay several overt-acts, and prove but one, yet he is to be found guilty of the high-treason, which is the imagining and compassing the death of the king, which is the crime laid in the indictment. * * *

Trial of Christopher Layer, 16 How. St. Tr. 94, 313–314 (1722), on motion in arrest of judgment:

> "*L. C. J.* [Sir John Pratt] You know, Mr. Hungerford, if but one overt act is well-laid and proved, it is sufficient.
>
> * * * * *
>
> "*Mr. Ketelbey.* * * * But, my lord, I must beg leave to take notice of what Mr. Attorney has observed relating to the five overt acts laid in the indictment, and submit to your lordship; for I don't know that it was ever determined otherwise, but that if one of the overt acts appears to be bad, judgment must be arrested.
>
> "*L. C. J.* Alas! quite the contrary: I believe you will find in Rookwood's trial, which you have in your hand: there it is said, if one overt act held, the indictment is good."[46]

[46] The ruling is actually in *Lowick's* trial, just quoted *supra*; *Rookwood's* case involved the admissibility of evidence of an overt act not laid in the indictment in order to prove the commission of another overt act which was so laid. See pp. 139–141, *infra*. But Lowick and Rookwood, though tried separately, were jointly indicted and, after conviction, were executed together. 13 How. St. Tr. at 308–310.

And see *ibid.*, pp. 314–315, for further discussion to the same effect.[47]

The English text-writers antedating the American Revolution are in consequence unanimous on the point. Hale says (1 *History of the Pleas of the Crown** 122):

> 3. That more overt-acts than one may be laid in an indictment, and then the proof of any of them so laid, being in law sufficient overt-acts, maintains the indictment.

Foster in his *Discourse on High Treason* states the rule as follows (*Crown Law*, 194):

> And if divers Overt-Acts are laid and but *one proved* it will be sufficient, and the Verdict must be for the Crown.

Hawkins (2 *Pleas of the Crown* (4th ed. 1762) 436) notes

> That where several Overt-Acts are laid in an Indictment of High Treason, the Proof of any of them maintains the Indictment as much as if every one of them were proved.

The earliest American decision is to the same effect. At the second trial of *Fries;* Fed. Case No. 5127 (C. C. D. Pa. 1800), the jury was instructed (9 Fed. Cas. at 932) that:

> If either of the three overt acts (or open deeds) stated in the indictment, is proved to

[47] See the same case, *sub nom. The King* v. *Layer*, 8 Mod. 82, 83: "And it was adjudged by THE COURT, that if but one overt act is well laid, judgment must pass against the defendant."

your satisfaction, THE COURT are of opinion, that it is sufficient to maintain the indictment; for THE COURT are of opinion that every overt act is treasonable.

Every modern American jury considering a case of treason has uniformly been charged to the same effect. *United States* v. *Fricke*, 259 Fed. 673, 677 (S. D. N. Y.); *United States* v. *Haupt*, 47 F. Supp. 836, 839 (N. D. Ill.), reversed on other grounds, 136 F. 2d 661 (C. C. A. 7); *Stephan* v. *United States*, 133 F. 2d 87, 92 (C. C. A. 6), certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423, see record in that case, No. 792, Oct. T. 1942, at pp. 326, 339–341; *Cramer* v. *United States*, 325 U. S. 1, see record in that case, No. 13, Oct. T. 1944, at pp. 442, 446. The propriety of such charges as definitions of the offense of treason has never been questioned.

Any other ruling would lead to absurd results. A defendant may be charged with five overt acts of treason, each of which is testified to by two different witnesses. In petitioner's view, if the jury should disbelieve any one of the 10 witnesses and thus find only four overt acts of treason, the defendant would be entitled to be acquitted and would thus be forever immune from punishment for his treachery. Clearly that is not the law. And it is significant that, in the *Stephan* case, the circuit court of appeals sustained the conviction

although it held that several of the overt acts were not supported by two witnesses. 133 F. 2d at 92–94. The *Stephan* case occupied the attention of this Court on four occasions, 318 U. S. 746; 318 U. S. 781; 319 U. S. 783; 319 U. S. 423; petitioner, therefore, is seeking a reversal for instructions under which Stephan went to and is staying in jail.

We believe that petitioner's contention on this point (Pet. 31–34, 64), and that of the dissenting judge below (R. 920–922, 927–929, 951–954), are the result of confusing the question of instructions to the jury as to the elements of the offense, with the principle of appellate action enunciated by this Court in the *Cramer* case, where it was said, in a footnote, citing *Stromberg* v. *California*, 283 U. S. 359, and *Williams* v. *North Carolina*, 317 U. S. 287, that the general verdict of the jury could be set aside "if any of the separable acts submitted was insufficient." 325 U. S. at 36, n. 45; and see *United States* v. *Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2), the same case below.

We turn then, to an examination of that principle, first generally, in its relationship to accepted principles of appellate review in criminal cases; next in its application to the crime of treason; and finally as to its bearing on the particular situation here presented.

B. *Generally, in the criminal law, a verdict stands if a single overt act has been proved, even though the others may be bad.*—In ordinary criminal cases where numerous overt acts are alleged,

it has always been considered sufficient to support a verdict if, on appeal, a single overt act is shown to be supported by evidence. This is the consistent and unquestioned rule in conspiracy cases; every circuit in which the question has arisen has so held. *Gilson* v. *United States*, 258 Fed. 588, 590 (C. C. A. 2), certiorari denied, 251 U. S. 555; *Blaustein* v. *United States*, 44 F. 2d 163, 164 (C. C. A. 3), certiorari denied *sub nom. Sokol* v. *United States*, 283 U. S. 838; *Short* v. *United States*, 91 F. 2d 614, 618 (C. C. A. 4); *Tacon* v. *United States*, 270 Fed. 88, 89 (C. C. A. 5); *Burkhardt* v. *United States*, 13 F. 2d 841, 842 (C. C. A. 6); *Jung Quey* v. *United States*, 222 Fed. 766, 771 (C. C. A. 9); *Minner* v. *United States*, 57 F. 2d 506, 510 (C. C. A. 10); *United States* v. *Richards*, 149 Fed. 443, 455 (D. Neb.); *United States* v. *Orr*, 233 Fed. 717, 718 (D. R. I.).

Similarly, in mail fraud cases, it is sufficient on appeal if the evidence shows that the defendant devised a scheme to defraud by at least one of the means or representations alleged, regardless of how many others may have been set forth in the indictment. This rule is likewise unquestioned. *United States* v. *Dilliard*, 101 F. 2d 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Kaplan* v. *United States*, 18 F. 2d 939, 943 (C. C. A. 2); *Mathews* v. *United States*, 15 F. 2d 139, 144 (C. C. A. 8); *Simons* v. *United States*, 119 F. 2d 539, 549 (C. C. A. 9), certiorari denied, 314 U. S.

616; *Shreve* v. *United States*, 103 F. 2d 796, 813 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Stephens* v. *United States*, 41 F. 2d 440, 446 (C. C. A. 9), certiorari denied *sub nom. Spicer* v. *United States*, 282 U. S. 880; *Havener* v. *United States*, 49 F. 2d 196, 199 (C. C. A. 10).

If it be objected that the quality of the overt act in conspiracy is different from that of the overt act in treason, as the latter was construed in the *Cramer* case, then the answer is that all the overt acts here in question meet the *Cramer* test. They were, as we have shown above, pp. 45–53, acts of aid and comfort to the enemy. That being so, there is no reason why a different rule of appellate review should be applied. And, as has been pointed out, the normal rule was applied on review of a conviction for treason, in *Stephan* v. *United States*, 133 F. 2d 87, 92–94 (C. C. A. 6), certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423; there the conviction was sustained notwithstanding the insufficiency, as a matter of two-witness proof, of four of the ten overt acts submitted to the jury. In other words, in treason as in conspiracy and mail fraud, the law does not speculate in favor of the convicted criminal simply because it is not possible to reconstruct the jury's mental processes. It is immaterial that the grounds on which they rested their verdict cannot be identified; the only inquiry on appeal is as to the sufficiency of the evidence.

Glasser v. *United States*, 315 U. S. 60, 80; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Burton* v. *United States*, 202 U. S. 344, 373. Since one overt act is sufficient for the commission of the offense, proof of one such act is sufficient to sustain a conviction.

A familiar analogy points in the same direction: When a defendant has been convicted on several counts of an indictment, and sentence not exceeding that permissible for a single count has followed, that sentence stands if supported by only a single good count, regardless of the infirmities of the others, and regardless of whether the trial judge would in fact have imposed that sentence had he known that some of the counts were bad. E. g., *Claassen* v. *United States*, 142 U. S. 140, 147; *Evans* v. *United States* (*No. 2*), 153 U. S. 608, 609; *Pinkerton* v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946. Here again, the law does not speculate in favor of the prisoner; "because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." *Claassen* v. *United States*, *supra*, 142 U. S. at 146–147.

Another analogy, though one somewhat farther removed, as we shall point out, is the case of a general verdict on an indictment containing several counts. In that situation it was well-settled, before the American Revolution, that, "if there is any one count to support the verdict, it shall stand

good, notwithstanding all the rest are bad." *Peake* v. *Oldham,* 1 Cowp. 275, 276 (1775); *Rex* v. *Benfield,* 2 Burr. 980, 985 (1760), both *per* Lord Mansfield, C. J. And that rule has always been followed in this Court; a general verdict of guilty, entered upon all the counts of an indictment, will stand if any of them is good. *Goode* v. *United States,* 159 U. S. 663, 669; *Powers* v. *United States,* 223 U. S. 303, 312; *Abrams* v. *United States,* 250 U. S. 616, 619; *Brooks* v. *United States,* 267 U. S. 432, 441. In each of these cases, the jury's verdict was simply "guilty as charged".[48] Consequently, viewed simply as a matter of lay psychology, the verdict, general in form, may well have rested, in the minds of the jurymen, at least in large measure on the counts later held bad or else not considered further on appeal. But the legal presumption and effect are otherwise.

Of course, the cases involving several counts of an indictment differ from cases involving several overt acts alleged in a single count. "Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States,* 284 U. S. 390, 393. This means that the general verdict of guilty on a multi-count indictment is in legal effect a special verdict of guilty on each count, whereas here the general verdict was not the equivalent of a finding that each of the overt acts alleged

[48] *Goode*, No. 616, Oct. T. 1895, R. 6; *Powers*, No. 152, Oct. T. 1911, R. 4; *Abrams*, No. 316, Oct. T. 1919, R. 239–240; *Brooks*, No. 286, Oct. T. 1924, R. 10.

had in fact been committed and proved to have been committed by the testimony of two direct witnesses. Moreover, a jury trying a defendant on an indictment containing several counts is always instructed that it may specifically find him not guilty on particular counts, while here the jury was given no opportunity to find specially that a particular overt act had not been proved by the required two-witness testimony.

Even so, the analogy of the indictment with several counts is not as far-fetched as it might appear. Suppose that here the present indictment had been in twenty-nine counts, each alleging a single overt act, and twelve counts had gone to the jury, and the jury had returned, as it did, a general verdict of guilty.[*] In that event there could have been no doubt as to the sufficiency of the judgment of conviction simply because some of the counts were, on appeal, held unsupported by the required two-witness testimony. Each count, though containing only a single overt act, would have charged the crime of treason. Is the result to be different because the draftsman alleged all the overt acts in a single count? In actual substance that is precisely what petitioner urges.

At any rate, and regardless of whether the analogy of the multi-count indictment is accepted or not, the general principles of the criminal law, as exemplified in the conspiracy cases and the

[*] "We the jury find the Defendant, Hans Max Haupt guilty as charged in the indictment" (R. 846).

mail fraud cases, show that verdicts supported by substantial evidence must be sustained when any overt acts or essential means of committing the crime have been sufficiently proved, regardless of whether it is possible to identify the precise grounds on which the jury acted. The rule in cases of treason, as exemplified in *Stephan* v. *United States*, 133 F. 2d 87 (C. C. A. 6), certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423, and as expounded in treason cases for 183 years preceding the *Stephan* decision, show that those general principles are applicable also to the offense here in question. On either ground or both, even if some of the overt acts should now be held quantitatively deficient in proof, the judgment below must be sustained.

C. *Since special verdicts are not generally employed in criminal cases, a contrary rule would mean that a defendant could never be charged with more than one overt act of treason except at the risk of acquittal if a single additional overt act submitted to the jury failed of proof.*—The *Cramer* footnote points out that "The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests." But special findings are not generally employed in criminal cases; special verdicts and interrogatories are usual only in civil litigation. Compare Rule 31, F. R. Crim. P., "Verdict," with Rule

49, F. R. Civ. P., "Special Verdicts and Interrogatories." Therefore the rule of the *Cramer* footnote, literally applied as the dissenting judge below thought it should be (R. 920–922, 926–930, 950–954), would mean that a defendant could never be charged with more than one overt act of treason except at the risk that his conviction would be reversed if a single additional overt act submitted to the jury should be held on appeal to be not supported by the requisite quantum of proof. That is to say, the more active the traitor and the more complex his treason, the better his chances of escaping the noose. Such a holding would, of course, completely overturn the hitherto settled rule in treason cases, *supra*, pp. 100–104, that one good overt act will support a verdict, and would either "make Men as safe in all Treasonable Practices as possible,"[50] or else require law enforcement officers and grand juries to draft and return voluminous indictments drawn on what would then be the only safe principle, viz., only one overt act per count.[51]

Actually, of course, there is no precedent for asking for special verdicts in cases where several overt acts are charged in an indictment. It

[50] Cf. Foster, *Crown Law*, 221.

[51] That such problems are not simply imaginary is indicated by the cases of persons who committed treason by broadcasting daily on the radio for the enemy, over a period of several years. How is a careful prosecutor to draft such an indictment if he cannot rely on the rule of the treason cases, *supra*, pp. 100–104?

certainly was never done in any treason case, where the rule was that one good overt act was enough. It has never been done in any conspiracy case, where the same rule obtains. And in the present case, petitioner's counsel expressed his satisfaction with the form of the general verdict submitted to the jury (R. 821).[52] And the instructions requested by petitioner (R. 725–732) did not include any suggestion that the jury should find specially the overt acts on which it relied.

Moreover, if special findings on the overt acts had been asked and received, and those findings had shown which of the overt acts were found by the jury to have been committed, the general verdict of guilty would still stand even if all but one of the overt acts thus specially found were held insufficient on appeal. That result follows from the rule in treason cases.

Apart from such speculation, however, we submit that petitioner's argument here, that the conviction fails if a single act is insufficient, really amounts to urging that this Court on appeal should invade the proper province of the jury.

---

[52] See Instruction No. 66 (R. 43): "* * * You will also take with you two forms of verdict. One form of verdict reads, 'We, the jury, find the defendant, Hans Max Haupt, not guilty as charged in the indictment.' The other form of verdict reads, 'We the jury, find the defendant, Hans Max Haupt, guilty as charged in the indictment.' Having arrived at a verdict, you will use the first form if you find the defendant not guilty, and the second form if you find the defendant guilty. * * *"

All that is involved, as to the overt acts in this case, is a sufficiency of evidentiary proof. The jury were specifically told that an overt act must be proved beyond a reasonable doubt, *and* by two direct witnesses. They were further told that the submission to them, of any overt act, carried no suggestion that such overt act had in fact been committed. The trial judge's instructions on these points were most explicit (R. 36–39):

> 47. The Court is submitting to your consideration as possible acts of treason, the following alleged acts, charged in the indictment. [Specifying them in the language of the indictment].
>
> 48. By submitting the alleged overt acts above read to your consideration, however, this court does not mean to intimate or infer in any way, either its belief or disbelief that any alleged overt acts of treason have been committed by this defendant, or that any overt acts of treason have been proven by the required two witnesses. Under the law, you are the sole judge of the facts and you alone can determine the factual issues including the question of whether this defendant committed any act or acts of treason and whether any such act was proven beyond a reasonable doubt by two direct witnesses to the same overt act.
>
> 49. Since the law requires that there shall be no conviction of treason unless there are two direct witnesses to the same

> overt act, all the other alleged overt acts charged in this indictment are hereby withdrawn from your consideration as overt acts of treason, for even if you believe beyond a reasonable doubt they were performed, they may not in themselves be made the basis of a conviction under the Constitution. * * *[53]

These instructions were correct, and in connection with the other instructions on the two-witness requirement (Nos. 42–44, R. 35–36), properly left the question of the evidentiary sufficiency of the overt acts to the trier of the facts. The circumstances that this case involves a quantitative requirement of proof, and that that requirement is found in the Constitution, does not, we submit, substitute the court for a correctly instructed jury in the determination of whether the petitioner, in fact, committed the acts he was charged with doing.

D. *The only authorities apparently to the contrary involve situations where, by misdirection of the jury, the prosecution was predicated on an unconstitutional ground or statute.*—We have already noted that the footnote in the *Cramer* case, 325 U. S. at 36, n. 45, which states that "Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must

[53] The remainder of Instruction No. 49 considers the bearing of the withdrawn overt acts on the question of intent, a matter discussed below, pp. 137–144.

be set aside if any of the separable acts submitted was insufficient," cites as supporting authority *Stromberg* v. *California,* 283 U. S. 359, 368, and *Williams* v. *North Carolina,* 317 U. S. 287, 292. We turn, accordingly, to an examination of those decisions.

Stromberg's conviction, as affirmed by the California District Court of Appeals, rested on a count which charged her with displaying a red flag, in violation of a state statute, (1) as a sign, symbol and emblem of opposition to organized government; and (2) as an invitation and stimulus to anarchistic action; and (3) as an aid to propaganda that is and was of a seditious character. 283 U. S. at 361. "The charge in the information, as to the purposes for which the flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. But in the instructions to the jury, the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named." 283 U. S. at 363; and see 363-364 for the text of the charge. At the trial, moreover, the State's attorney had "emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses." 283 U. S. at 368.

Appellant, without questioning the charge as

such, challenged the constitutionality of the statute as a whole. Chief Justice Hughes said, therefore (283 U. S. at 364–365),

> As the trial court had treated the three purposes of the statute disjunctively, and the appellant had accepted that construction, we think that the only fair interpretation of her contention is that it related to the validity, not merely of the statute taken as a whole, but of each one of the three clauses separately relied upon by the State in order to obtain a conviction. Her concession as to the interpretation of the statute emphasizes, rather than destroys, that contention.

The Chief Justice, after indicating the views of the state appellate court, continued (283 U. S. at 367): "Having reached these conclusions as to the meaning of the three clauses of the statute, and doubting the constitutionality of the first clause, the state court rested its decision upon the remaining clauses. * * * Accordingly, disregarding the first clause of the statute, and upholding the other clauses, the conviction of the appellant was sustained." Then follows the passage relied on in the *Cramer* footnote (283 U. S. at 367–368):

> We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in

the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition; as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

We believe, therefore, that the *Stromberg* decision is properly limited to its particular facts, to the circumstance that appellant was tried on one clause and that the conviction was affirmed on other clauses in the State court, and that it does not lay down any rule of general application at variance with accepted principles of criminal pleading and procedure.

In *Williams* v. *North Carolina*, 317 U. S. 287, petitioners were tried and convicted of bigamous cohabitation. They offered in their defense copies of the Nevada divorce proceedings which each had instituted, contending that the several divorce decrees and their own Nevada marriage were valid in North Carolina as well as in Nevada. The prosecution contended that the Nevada decrees were invalid because neither of the defendants in those actions was served with process in Nevada or had entered an appearance there. On this issue the trial court charged the jury that a Nevada divorce decree based on substituted service and where the defendant made no appearance would be invalid. The prosecution additionally urged that petitioners went to Nevada to obtain a divorce through fraud on the Nevada court and not with any intention of establishing a *bona fide* residence there. On that issue, the court charged that petitioners had the burden of satisfying the jury, though not beyond a reasonable doubt, of the *bona fides* of their Nevada residence.

On appeal, the Supreme Court of North Carolina affirmed the conviction, holding that North Carolina was not required to give the Nevada decree full faith and credit because of *Haddock* v. *Haddock*, 201 U. S. 562. It intimated that the decrees were collusive in any event, suggesting that the prosecution's second theory may have been an alternative ground for the judgment under *Bell* v. *Bell*, 181 U. S. 175.

This Court did not reach the latter issue. For one thing, North Carolina virtually conceded petitioners' Nevada domicile. Then follows the passage relied on in the *Cramer* footnote (317 U. S. 291–292):

> * * * In the second place, the verdict against petitioners was a general one. Hence, even though the doctrine of *Bell* v. *Bell, supra,* were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, *viz.* the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the defendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows here as in *Stromberg* v. *California*, 283 U. S. 359, 368, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. No reason has been suggested why the rule of the *Stromberg* case is inapplicable here. Nor has any reason been advanced why the rule of the *Stromberg* case is not both appropriate and necessary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to

countenance a procedure which would cause a serious impairment of constitutional rights. Accordingly, we cannot avoid meeting the *Haddock* v. *Haddock* issue in this case by saying that the petitioners acquired no *bona fide* domicile in Nevada. If the case had been tried and submitted on that issue only, we would have quite a different problem, as *Bell* v. *Bell* indicates. We have no occasion to meet that issue now and we intimate no opinion on it.

The *Williams* decision may perhaps go beyond the *Stromberg* ruling; it is capable of being construed to hold that, where a prosecution is predicated on an unconstitutional ground, a verdict will not be upheld on appeal where it cannot be shown that the instructions to the jury were free of constitutional infirmity.

In any event, it seems clear on analysis of the *Stromberg* and *Williams* cases that they do not support the broad, generalized and unequivocal rule stated in the *Cramer* footnote. The justification for setting aside Cramer's conviction must rest, not on the ground that it "is not possible to identify the grounds on which Cramer was convicted," but in the circumstance that it appeared probable that he was found guilty on precisely those overt acts which this Court held insufficient, and not on the third overt act which the opinion of the Court did not consider. The case involved a misdirection, in that the jury were permitted to consider as overt acts of treason the meetings

which this Court held did not amount to such acts. That misdirection affected the result, for it is certainly very doubtful whether the jury would have found Cramer guilty of treason if the only overt act submitted to them had been the third one, which charged Cramer, after his own arrest, with concealing the identity of the saboteur Thiel by making a false statement to an F. B. I. agent.

In other words, the rule of the *Cramer* footnote and of the cases it cites is a rule of reason to be invoked for the protection of a defendant's constitutional rights. It is not an immutable absolute. It is not a rule which sets aside a verdict whenever the jury's reasoning cannot be classified or identified. It is a rule to be applied whenever there is, not merely a remote possibility, but a very real probability, that, by reason of misdirection, the verdict of the jury is based on the specific law or doctrine or overt act which this Court holds to be insufficient.

The *Cramer* footnote does not purport to question the rule of the conspiracy and mail fraud cases, that one overt act or one essential means properly proved sustains the verdict regardless of how many such acts or means are alleged in the indictment. Nor does the *Cramer* footnote purport to question or to alter the rule in treason that one good overt act similarly sustains the verdict regardless of insufficiency of proof as to the rest. For the Court's attention was not directed to the

latter rule. Examination of the voluminous briefs filed in the *Cramer* case both on argument and reargument, briefs aggregating over 700 pages, show that this point was not discussed, except for a single summary reference to what the circuit court of appeals had said on it below (Pet. I Br., No. 13, Oct. T. 1944, p. 18). We advert in the margin to the patent infirmities of that authority.[54]

---

[54] *United States* v. *Cramer*, 137 F. 2d at 893: "If any one was insufficient to support a conviction, it was reversible error for the judge to submit it to the jury, unless he had required the jury to find separately as to each, as he did not." Citing, with a cf., *Nash* v. *United States*, 229 U. S. 373; *Gilson* v. *United States*, 258 Fed. 588 (C. C. A. 2), certiorari denied, 251 U. S. 555; and *Minner* v. *United States*, 57 F. 2d 506 (C. C. A. 10).

The *Nash* case involved a misdirection of the jury in a prosecution for conspiracy to restrain trade under the Sherman Act; it was held error to charge that a verdict might be permitted on any one of several methods employed by the defendants, as alleged in the indictment, when some of them would not warrant a finding of conspiracy; but it was held not necessary, in order to convict, to prove every means alleged. The *Minner* case holds, *inter alia*, that, in a prosecution to violate the Prohibition Act, it was error to submit overt acts done in furtherance of a different conspiracy. The *Minner* case also holds, 57 F. 2d at 510, as does the *Gilson* case, 258 Fed. at 590, the precise opposite of the proposition for which it is cited. See pp. 104–105, *supra*.

The circuit court of appeals in the *Cramer* case then went on to distinguish the usual rule in conspiracy cases, see *supra*, pp. 104–105, by differentiating the jury's determination of the evidentiary sufficiency of overt acts in conspiracy from a determination of the legal sufficiency of such acts in treason. No authorities were cited, and nothing offered beyond bare as-

The significant point in our view is that there is not only no support in the general authorities for the application of the rule of the *Cramer* footnote to a treason case such as this one, where the jury was properly instructed as to the elements of the crime, but that, on the contrary, the basic approach of the general authorities, the more particularized rule governing analogous offenses, and the oft-repeated and up to now unquestioned doctrine of the treason cases, are uniformly the other way.

E. *On the facts of the present case, it is wholly unreasonable to assume that the jury, consistently with its verdict and in view of the circumstance that the doing of the overt acts was not disputed, could have been misled by an insufficiency of proof as to any overt act.*—We have indicated why in our view the rule of the *Cramer* footnote cannot in terms be properly applied here. But conceding for purposes of argument that it is a rule of reason, and that it was properly applied on its own facts, on the view that a jury would be unlikely to find treason in a lie told to a law enforcement officer and soon thereafter retracted—such a

---

sertion for the proposition that a jury in a treason case, under proper instructions as to the two-witness requirement, may not return a general verdict without specifying on which overt acts that verdict was rested, under pain of having the verdict set aside if any overt acts are later held deficient on appeal. The treason cases holding that one overt act is sufficient to support an indictment (*supra*, pp. 100–104), are neither cited nor discussed.

concession does not require reversal here, where the facts are so very different. Here it is clear that the jury, to convict at all, must have rested its verdict on the overt acts which either are not or else cannot be disputed.

The only conceivable challenge to the sufficiency of the overt acts submitted to the jury is as to the sufficiency of the proof to establish the overt acts of harboring on the days other than June 23. But actually, in substance, overt acts 12, 17, and 20–23 do not really charge separate overt acts of treason. They all charge a single act of aid and comfort: sheltering and harboring an enemy saboteur.

It would have been sufficient for the indictment to have charged that, on or about June 23, petitioner harbored and sheltered Herbert. It would also have been sufficient for the indictment to have alleged that petitioner harbored and sheltered Herbert on divers days between on or about June 22 and on or about June 27. Either alternative might have been better pleading as a matter of draftsmanship. If, on either variant, exactly the same testimony had been offered to support the allegation as was offered in support of the six separate overt acts—*viz.*, testimony of two witnesses who saw Herbert in the apartment, and testimony of the others as to the location of the Haupt apartment and as to petitioner's and Herbert's movements—we do not think it could be contended

for one moment that such overt act of harboring had not been sufficiently proved by two witnesses.

Is the result to be different because of the pleader's choice, because the draftsman of this particular indictment leaned to the side of over-cautiousness or over-particularity? Should the niceties of criminal pleading be a ground for finding error where none would otherwise exist? Here there is not even a remote possibility that the jury would have believed that petitioner harbored Herbert from the testimony of the F. B. I. agents watching the outside of petitioner's apartment, but would not believe the same thing from the testimony of the two witnesses who actually saw Herbert inside the apartment.

Hence we submit that even if, on the view of the dissenting judge below (R. 922–926)—a view which has but shaky support on the authorities—the evidence of harboring on days other than June 23 could in some manner be considered as evidence not satisfying the constitutional requirement of "Testimony of two Witnesses", it does not follow that the conviction must be reversed. Even in an age much more given to profitless technicalities than our own, the exact date on which an overt act of treason was committed was held not to be a matter of substance. *Mr. Townly's Case,* Foster, *Crown Law* 7, 8–9; *Lord Balmerino's Case,* Foster, *Crown Law,* 9 n.[55]

[55] The modern English law is to the same effect. See the count of the indictment on which the conviction was had in

The essence of the offense, as to these overt acts, was not harboring at any one particular time, but the act of harboring. That act was clearly proved by two witnesses.

The real issue at the trial, as we have already pointed out, was not as to the doing of the overt acts, but as to the intent with which they were done. The purchase of the automobile was conceded by counsel, and the sheltering of Herbert and the matter of assisting him to obtain employment were virtually admitted. See pp. 53–54, *supra*. The credibility of no single witness who

---

Joyce v. *Director of Public Prosecutions*, [1946] A. C. 347, 348:

STATEMENT OF OFFENCE

High Treason by adhering to the King's enemies elsewhere than in the King's Realm, to wit, in the German Realm, contrary to the Treason Act, 1351.

PARTICULARS OF OFFENCE

William Joyce, on September 18, 1939, and on divers other days thereafter and between that day and July 2, 1940, being then—to wit on the several days—a person owing allegiance to our Lord the King, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Realm and its subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without the Realm of England, to wit, in the Realm of Germany by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King.

testified to the doing of the overt acts was even attempted to be impugned.[56] The testimony as to all the overt acts was so thoroughly linked together by the testimony of the F. B. I. agents that the jury, if it credited the agents' testimony at all, as it had to do in order to convict, was bound to find that all the overt acts had been committed. Consequently, on this basis also, the possible insufficiency of some of the harboring acts could not invalidate the conviction.

As we have pointed out at some length above, pp. 104–107, our contentions under these headings involve no departure from established principles; to the contrary. We urge here an adherence to the settled rules already discussed—the rule that a reviewing court in a criminal case will examine the evidence only to determine whether it is sufficient to support the verdict, and that, in other cases involving allegations of numerous means or overt acts, the appellate court's function ends when it finds that any overt act or essential means of committing the crime has been sufficiently proved. We have also shown how those rules were applied to a treason prosecution in *Ste-*

---

[56] Zermer, who testified that he saw Herbert in petitioner's apartment on June 23, proved to be hostile to the Government and was cross-examined by the Government as a hostile witness. See *infra*, p. 152. But his bias in favor of petitioner hardly tends to weaken the weight of his testimony against petitioner.

phan v. *United States*, 133 F. 2d 87 (C. C. A. 6), certiorari denied, 318 U. S. 781, rehearing denied, 319 U. S. 783, application for allowance of direct appeal denied, 319 U. S. 423, where the conviction was affirmed although several of the overt acts submitted to the jury were found to be not supported by the testimony of two direct witnesses. While this result follows from the long-standing rule in treason prosecutions, it could also be justified on the ground that the factual situation in the *Stephan* case was similar to that presented here, in that there could be no reasonable or substantial probability that the jury based its verdict on the insufficient overt acts alone.

Stromberg v. *California*, 283 U. S. 359, and the cases applying the doctrine there laid down, including *Cramer* v. *United States*, 325 U. S. 1, are themselves a departure from the normal rule of appellate review in criminal cases, a departure occasioned, as we have shown, by the special facts those cases presented, by the very real probability that those verdicts were based on conduct held insufficient. Since there is no such probability here, there is no reason to apply the extraordinary rule of those cases. Here it is clear that the jury must have found that petitioner committed more than one legally sufficient overt act of treason properly proved by the direct testimony of two witnesses. Since any one of those acts, coupled with intent to betray, establishes the complete offense, petitioner's conviction must be affirmed.

A reversal in this case on the ground that any of the overt acts failed of proof would turn appellate review in criminal cases into an absorbing contest between the draftsman of the indictment and the ultimate appellate court, not on the issue of defendant's guilt, not on the issue whether he had a fair trial free from error, but rather on the insubstantial formalism of whether the indictment should have twenty-nine counts each containing one overt act, or whether it should consist instead of only one count alleging twenty-nine overt acts; of whether a continuing act is to be broken up into several overt acts, in the ratio of one such act for one calendar day, or whether it is preferably to be alleged as a single overt act over a space of several days. It is perhaps unnecessary to remark that such a disposition of this case would hardly be conducive to certainty in the administration of justice. It would serve neither to protect persons unjustly accused of what is still perhaps the most serious crime of all, nor would it shield the community against the evil machinations of the disaffected and the disloyal. But it would exalt form over substance far beyond even the refinements of the seventeenth century common law on this precise point. And it would also legislate into the law of treason a qualification which no English or American court prior to August 1943 ever found there, and one which the Founders most assuredly did not fashion.

IV. THERE WERE NO ERRORS IN THE ADMISSION OF EVIDENCE

A. *The evidence tending to show petitioner's treasonable intent was properly admitted.*—The trial court admitted, as bearing on the issue of intent, evidence of (1) pre-war statements by petitioner showing an intense devotion to Hitler and Nazi Germany; (2) one-witness testimony concerning overt acts alleged in the indictment but not submitted to the jury as overt acts of treason; and (3) extrajudicial admissions by petitioner. That intent is an element separate from the overt act which may be proved by any relevant evidence was reaffirmed by the *Cramer* decision. This Court there said (325 U. S. at 31):

> Bearing in mind that the constitutional requirement in effect is one of direct rather than circumstantial evidence, we must give it a reasonable effect in the light of its purpose both to preserve the offense and to protect citizens from its abuse. What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses, it would be to hold that it is never provable. It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses.

Petitioner's challenge to the admissibility of all this evidence (Pet. 34–38) is also fully answered by the opinion of this Court in the *Cramer* decision, where it said, 325 U. S. at 33:

> It would be no contribution to certainty of judgment, which is the object of the provision, to construe it to deprive a trial court of the aid of testimony under the ordinary sanctions of verity, provided, of course, resort is not had to evidence of less than the constitutional standard to supply deficiencies in the constitutional measure of proof of overt acts. For it must be remembered that the constitutional provision establishes a minimum of proof of incriminating acts, without which there can be no conviction, but it is not otherwise a limitation on the evidence with which a jury may be persuaded that it ought to convict. * * *

1. The evidence of petitioner's pre-war statements is summarized in the Statement, *supra*, pp. 27–30. It consists of a few statements in 1936 and 1937 and others in the years immediately preceding the present war with Germany. The statements were not of general criticism of the United States or of refusal to buy war bonds, as in the *Cramer* case. They were statements showing adulation of Hitler and of Nazi Germany; statements respecting proposed fifth-column activities by German organizations to which petitioner belonged, in the event of a war between the United

States and Germany; and statements to the effect that, in such a war, petitioner would be loyal to Germany, would urge his son to serve in the German armed forces, would not permit him to serve in the American Army, and a statement that, if petitioner himself were taken into the Army, "he would crawl over the enemy lines and tell them our position" (R. 590).

At the time the testimony was admitted, the trial judge instructed the jury that the statements were restricted solely to the issue of intent (R. 500, 515, 587), and he so instructed the jury at the close of the case, carefully pointing out that petitioner's pre-war statements violated no law and were not in themselves any evidence of treason.[57]

As we have shown, intent was the only seriously contested issue of fact at the trial. Particularly in view of the father-son relationship between

[57] His instructions in this respect were as follows (R. 41):

> 58. There has been some testimony of certain statements purportedly made by the defendant prior to our declaration of war with Germany. Such statements of the defendant, if you believe they were made, are not grounds for charging the defendant with treason. The defendant, as well as others, had the right to his opinions and he had a right to express his opinions and to do anything lawful in keeping with those opinions and sympathies, but those statements, if you believe any were made, may be borne in mind by you in determining what his intent may have been after this country was at war with Germany, in committing, if you find beyond a reasonable doubt that he did so commit, any of the various overt acts charged in the indictment and

petitioner and the saboteur, the overt acts, although clearly acts of aid and comfort, would not necessarily carry incriminating implications of intent to betray. Such was petitioner's argument (R. 798–808). That element of the offense had to be established by evidence beyond the acts themselves. Because of this circumstance, any evidence having a logical tendency to show a disloyal state of mind was directly relevant to the fundamental issue in the case. That antecedent statements showing a disposition to adhere to the enemy have such logical relevance was recognized in both English and American treason trials. *Trial of Parkyns,* 13 How. St. Tr. 63, 90, 114 (1696); *Trial of Lowick,* 13 How. St. Tr. 267, 305

---

submitted to your consideration by the court in these instructions.

59. No law of the United States is violated when a person in a general discussion expresses favorable or adverse opinions as to members of any race, color or creed, or regarding any nationality.

60. The Court has permitted the Government to introduce into evidence in this case certain alleged statements or utterances purportedly made by the defendant prior to the events forming the basis of the indictment in this case. Such statements or utterances, if you believe they were made by the defendant, do not constitute evidence of the commission either of the treason alleged or of the commission of any alleged overt act, but may be considered by you, if you credit them, solely in determining the intent or state of mind of the defendant in performing, if you find he did perform, any alleged overt act or acts of treason charged in the indictment to have been committed by him, and submitted to your consideration in these instructions.

(1696); *Respublica* v. *Malin,* 1 Dall. 33, 34 (Pa. 1778); *Respublica* v. *Roberts,* 1 Dall. 39 (Pa. 1778).

In the *Malin* case, the defendant, mistaking American troops for British, went over to them; and the prosecution offered statements made by him, to prove the mistake, and to prove his real intention of joining and adhering to the enemy. Over objection by defense counsel—James Wilson among them—the court admitted the testimony, saying (1 Dall. at 34):

> No evidence of words, relative to the mistake of the *American* troops, can be admitted; for any adherence to them, though contrary to the design of the party, cannot possibly come within the idea of treason. But, as it appears that the prisoner was actually with the enemy, at another time, words indicating his intention to join them are proper testimony, to explain the motives upon which that intention was afterwards carried into effect.

Similarly, in the *Roberts* case, the defendant was charged with treason in persuading others to enlist in the British army, and evidence was offered for the prosecution that the defendant had attempted to prevail upon the witness to enlist in the enemy forces, but that he did not succeed. Counsel for the prisoner—Ross and Wilson—argued that persuading implies success, and that there could be no treason under the act of assembly without an actual enlistment. The

Court accepted this contention in its substantive aspect, but added (1 Dall. at 39):

> The evidence offered, however, is proper to show *quo animo* the prisoner himself joined the British forces.

Testimony of antecedent statements has customarily been admitted as bearing on intent in other criminal cases in which the defendant's state of mind is of crucial significance.[58] Here the statements all bore on petitioner's loyalty and allegiance; and all of them followed a consistent pattern. As this Court but recently observed in a related case, "The fundamental question is whether the new citizen still takes his orders from, or owes his allegiance to, a foreign chancellory." *Knauer* v. *United States*, No. 510, Oct. T. 1945, decided June 10, 1946 (p. 4 of slip opinion). And the statements here admitted all tended to show, not a reservation of cultural feelings, not a

[58] *Williamson* v. *United States*, 207 U. S. 425; *Allis* v. *United States*, 155 U. S. 117, 119; *Wood* v. *United States*, 16 Pet. 342, 360–361; *Viereck* v. *United States*, 130 F. 2d 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley*, 132 F. 2d 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Howenstine* v. *United States*, 263 Fed. 1, 5–6 (C. C. A. 9); *Stenzel* v. *United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler* v. *United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman* v. *United States*, 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States*, 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States*, 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

criticism of policies and officials, but a reservation of loyalty; they showed that petitioner "had no feeling for the United States at all. His feelings were only for Germany" (R. 590–591).[59]

Clearly, a son in this country on a hostile mission would be more likely to reveal his plans to a father whose primary loyalty was to Germany than to one whose allegiance to the United States had never wavered. Moreover, a father so predisposed to the enemy would be more likely knowingly to aid that hostile mission. Evidence of petitioner's state of mind in the period immediately preceding the doing of the overt acts charged was important as showing that petitioner did more than help his son; that, as he himself later stated, he assisted Herbert because, "after all he was helping the fatherland" (R. 573).

Petitioner's contention that the evidence of his pre-war statements was prejudicial (Pet. 8, 34) is not well taken. That evidence was damaging, undoubtedly; it was not, however, improperly admitted. In a prosecution for murder, for instance, evidence that the defendant beat his wife and cheated at cards would be inadmissible, but evidence that he said he would kill the decedent if he ever met him would not be, though assuredly it

[59] Compare *Knauer* v. *United States*, *supra*, p. 10 of slip opinion: "And this case * * * is not complicated by the fact that when the alien took his oath Hitler was not in power. On April 13, 1937, Hitler was in full command. The evidence is most convincing that at that time, as well as later, Knauer's loyalty ran to him, not to this country."

would be damaging and highly incriminating. Here the evidence admitted against petitioner was of statements that, in the event of war, he would adhere to the enemies of the United States. Since that evidence had a direct bearing on the issue of intent, it was properly received.

2. Of the 29 overt acts charged in the indictment, 17 were not submitted to the jury because the prosecution was not satisfied that it had established those acts by the testimony of two witnesses (R. 660–661), and only 12 acts, which the judge felt "may or can be proven by the testimony of two witnesses" (R. 666) were submitted. Thereafter, the trial judge instructed the jury that, even if they believed the withdrawn acts had been committed, such acts in themselves could not be made the basis of a conviction under the Constitution, but that, if the jury believed that petitioner had actually performed any of such acts, such evidence could be considered on the question of intent (R. 39).[20]

[20] The text of the charge was as follows (R. 39):

49. Since the law requires that there shall be no conviction of treason unless there are two direct witnesses to the same overt act, all the other alleged overt acts charged in this indictment are hereby withdrawn from your consideration as overt acts of treason, for even if you believe beyond a reasonable doubt they were performed, they may not in themselves be made the basis of a conviction under the Constitution. However, if you believe beyond a reasonable doubt that the defendant did actually perform any of these other alleged overt acts

Petitioner's argument (Pet. 36–37) that it was error to permit the jury to consider evidence of withdrawn overt acts even on the issue of intent is predicated on a misinterpretation of the passage which he quotes from the *Cramer* opinion, 325 U. S. at 39, that "We cannot sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason." This Court was there contrasting the insufficiency, as acts of aid and comfort to the enemy, of the overt acts submitted to the jury, with the treasonable character of the withdrawn acts. It held merely that the withdrawn acts could not be relied upon to supply a deficiency in the two-witness proof of the submitted overt acts. It did not hold that, where a legally sufficient overt act of treason has been properly proved, evidence of other treasonable acts becomes irrelevant; as we have shown, *supra*, pp. 130–131, it expressly held to the contrary.

Even under the St. 7 Will. III, c. 3, which provided that no evidence could be given of overt acts

---

which were not proven to the degree required by the Constitution, you may consider any such act in determining the question of the intent with which the defendant may have performed, if you find beyond a reasonable doubt he did perform, any of the above alleged overt acts submitted to your consideration and not withdrawn, and which other possible overt acts, not withdrawn, you find from all of the evidence are proven beyond a reasonable doubt by two direct witnesses to the same overt act.

not expressly laid in the indictment,[81] it was early held that proof of overt acts not alleged was admissible if such evidence tended to prove the acts charged. *Trial of Rookwood*, 13 How. St. Tr. 139, 217–220 (1696); *Trial of Layer*, 16 How. St. Tr. 94, 220–223 (1722); *Mr. Deacon's case*, Foster, *Crown Law*, 9; 18 How. St. Tr. 366, 366–367 (1746); *Sir John Wedderburn's case*, Foster, *Crown Law*, 22; 18 How. St. Tr. 425, 427 (1746); see Foster, *Crown Law*, 245.

The *Trial of Rookwood, supra*, in 1696, is probably the leading case. There, the defendant was indicted for compassing the death of the King, and the overt acts alleged were a meeting with others to arrange for waylaying the King and attacking him in his coach, and an agreement to provide forty men for that purpose. When Holt, L. C. J., in summing up to the jury, mentioned that the defendant had produced a list of the men, the latter interrupted (13 How. St. Tr. at 217):

> *Rookwood.* That was not in the indictment.
>
> *L. C. J.* [*Holt*] But you were at that meeting, which is laid in the indictment.

---

[81] "[VIII.] And bee it further enacted that noe evidence shall bee admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever."

Compare Instruction No. 46 in the present case (R. 36): "One may not of course be convicted of treason upon evidence of an overt act, unless such act has been charged in the indictment."

Rookwood. My lord, that list is not in the indictment; the list in the indictment refers to Mr. Cranburne.

L. C. J. No, but that is evidence of your being in the design; I hope that list of men will be some evidence of the consent and agreement that Mr. Rookwood was to command a party.

Sir *B. Shower* [for the prisoner]. With submission, my lord, the words of the act seem otherwise, and that no overt-act should be given in evidence, that is not expressly alledged.

L. C. J. But cannot there be one act, that may be proof of another act which is alledged?

Sir *B. Shower.* Then there is no advantage of this law; for, my lord, the end of the act was, That they should know the particular crimes that they were to answer to. * * * The law says, Ye shall not give evidence of any overt-act that is not expressly mentioned.

L. C. J. It is not urged as an overt-act, but as evidence of an overt-act that is alledged; for instance, the overt-act alledged is, that they did meet and consult, shall not they give in evidence what was said and done at those meetings, though not alledged? Sir George Barcley produced a scheme at the Globe-tavern, shall not the producing of that scheme be given in evidence? If it may, why not the giving the list to Harris?

After further discussion, the Lord Chief Justice resumed his charge to the jury (p. 220):

L. C. J. Then, gentlemen, as to this matter which they have objected, that this list given on the day of the intended assassination, ought not to be allowed as evidence to prove the treason, because it is not specially laid in the indictment, but is by the late act of parliament excluded from being proved to convict the prisoner: Now though the act doth exclude the giving in evidence of any overt-act that is not laid in the indictment, yet it doth not exclude such evidence as is proper and fit to prove that overt-act that is laid in the indictment. Therefore the question is, Whether this giving of the list does not prove some overt-act that is alledged in the indictment? There is in the indictment an agreement laid to kill the king; and if that be proved, that is an overt-act of this treason. Now when the consent and agreement of Mr. Rookwood to that design is proved, surely the proof of his giving a list of men, is a further proof that he did agree to it, and then it is very proper to be given in evidence; for if by the new statute no one act can be given in evidence to prove another, then must not only the overt-act, but also the evidence of that act be expressed in the indictment.

Similarly, in the *Trial of Layer, supra*, the defendant was charged with high treason in composing and imagining the death of the king, and the overt-acts alleged were the conspiring to depose the king and to place the Pretender on the

throne. Evidence was offered of Layer's corresponding with the Pretender, which was not alleged in the indictment, and which was made a separate kind of treason by the St. 13 Will. III, c. 3. Objection was made (16 How. St. Tr. 220 *et. seq.*), and Mr. Hungerford, for the prisoner, said (p. 222):

> There is an act of parliament in the last year of King William, whereby the Pretender is attainted, which makes corresponding with the Pretender, or any of his adherents high treason; and when any man commits that particular treason, he is liable to be taken up and prosecuted for it. Now, my lord, shall they be admitted to give an evidence of a treason committed in breach of one act of parliament, when they are prosecuting him upon another; they may as well offer evidence against him for counterfeiting the great seal, or clipping and coining, for the sake of evidence: we hope this practice shall not be allowed * * *

The objection was overruled and the evidence received, Sir John Pratt, L. C. J., saying (p. 223):

> *L. C. J.* Sure as this evidence is offered it is very proper; consider, in the indictment the overt-acts are, meeting, consulting, advising and agreeing to raise a rebellion. The next is, publishing a traitorous libel, in which rewards are promised to those that would assist in this rebellion; a third overt act is, the engaging and list-

ing men for the service of the Pretender; a fourth is, a designing to depose the king; and another is, to set up the Pretender on the throne: Now, consider, if they have not given an evidence of these overt-acts, whether sufficient or not, that must be left to the jury; if they have given evidence of these acts, a design to set up the Pretender, and to depose the king, &c. If they are not proper to shew for this purpose this gentleman corresponded with Rome, was with the Pretender, these letters sent from sir William Ellis to him: letters (according to his desire) purporting receipts for sums of money to be signed by the Pretender, as a foundation to oblige him to make re-payment: After this and these things have been offered, is it not proper to go as far as they can on this head, and shew how far he hath been engaged with the Pretender and his accomplices? Sure it is proper, as a further evidence of these overt-acts.

The cases of *Deacon* and *Wedderburn*, *supra*, both tried in 1746, and both fully reported in Foster's *Crown Law*, are to the same effect; it was held in each "that an Overt Act not laid may be given in Evidence, if it be a direct Proof of any of the Overt Acts that are laid."

The meaning of Section 8 of the St. 7 Will. III, c. 3, is accordingly summed up in Foster's text as follows (*Crown Law*, 245):

> The Sense of this Clause I take to be, that no Overt-Act amounting *to a distinct*

> *Independent Charge*, though falling under the same Head of Treason, shall be given in Evidence, unless it be expressly laid in the Indictment; but still, if it amounted to a direct Proof of any of the Overt-Acts that are laid, it may be given in Evidence of such Overt-Acts.

The matter is thus clear on the decided cases. And certainly, on principle, the mere circumstance that particular overt acts were first alleged and then withdrawn does not render evidence thereof less relevant on the issue of intent. To assert the contrary is to urge a formalism quite unrelated either to truth or justice.

3. Petitioner contends (Pet. 37–38) that the treason clause of the Constiution permits the use of a confession only when made in open court, and that hence it was improper to receive any evidence of his extra-judicial confessions. But his argument in this respect wholly misconceives the meaning of the Constitutional provision.

The Constitution (following the St. 7 Will. III) permits a confession to take the place of two-witness proof of the overt act only if the confession is made in open court; but, where the overt act is otherwise sufficiently proved by two witnesses, the provision does not preclude the use of an extra-judicial confession as evidence by way of corroboration. Both the English cases under the St. 7 Will. III and the early American treason cases hold squarely that an extra-judicial confes-

sion, although insufficient in itself to establish treason, may none the less properly be offered in addition to other proof. *Trial of Francis Willis,* 15 How. St. Tr. 614, 623–625 (1710); *Respublica* v. *Roberts,* 1 Dall. 39 (Pa. 1778); *Respublica* v. *McCarty,* 2 Dall. 86 (Pa. 1781) *Case of Fries,* Fed. Case No. 5126, 9 Fed. Cas. at 909 (C. C. D. Pa. 1799); Foster, *Crown Law,* 241–242.

Willis was tried at the Old Bailey in 1710 for high treason by levying war, "under Pretence of pulling down Meeting Houses." When a witness was asked for a conversation had with the prisoner, Willis' counsel objected. The extracts which follow show the scope of the ruling (15 How. St. Tr. at 623–625):

> Mr. *Darnell.* My lord, we humbly submit it, that what he has said, cannot be made use of against him; for the statute of the seventh of king William directs, that he shall not have any evidence given against him relating to his word; for the act directs, that * * * no person shall be attainted of high treason * * * but by the oaths and testimony of two lawful witnesses, either, both to the same overt-act, or one to one, and the other to another overt-act of the same treason, unless the party willingly, in open court, confess the same, or stand mute, &c.
>
> *L. C. J.* [Sir Thomas Parker, later Lord Macclesfield]. Where do you find in that act, that what he confesses is not to be given in evidence?

Mr. *Darnell.* Because that act provides, that none shall be tried but upon the oaths of two witnesses to an overt-act. Unless the person shall confess in open court, he shall be tried by the oaths of witnesses to an overt-act. Now to what he has done they may call witnesses; but to what he has said, we hope they shall not. Confessions are, in all cases, a dangerous evidence, and to be used very cautiously * * *

L. C. J. * * * Suppose two witnesses prove an overt-act, and besides them there should be others to prove his confession, is not that act complied with, when some prove the fact, and others come in confirmation of them? It does not follow but that if there be two witnesses to overt-acts, there may be as many others to prove confessions; It does not say, that no evidence shall be given but of overt-acts.

L. C. Baron. [Sir Edward Ward]. If a man confesses before a magistrate that he is guilty of treason, and that confession of his should be proved by two witnesses, it may be disputed, whether he shall be convicted on that evidence, because it is said, there must be two witnesses to an overt-act. If they have no other evidence but his confession, then will be a proper time to make your objection; but till then, there is no reason to object against what is now offered.

* * * * *

Justice Tracy [J. C. P.] I never knew it disputed, but a man's confession might be given in evidence.

Mr. *Darnell.* The act says, he shall not be tried, but on the oaths of two witnesses to an overt-act, unless the party willingly, in open court, confess the same; which shews what confession it is that is to be admitted of.

L. C. J. Then you say, no confession shall be given in evidence; Now, pray, what words are there in the act, that say no confession shall be given in evidence?

L. C. Baron. A confession shall not supply the want of a witness; there shall be two witnesses to the treason notwithstanding: But to say it shall not be given in evidence, there is no ground for it.

In *Respublica* v. *Roberts,* 1 Dall. 39, *supra,* decided in 1778, a confession of the defendant, offered in evidence, was objected to. Counsel for the defense, among them James Wilson, objected, and cited the St. 7 Will. III, c. 3, and a Pennsylvania statute which "totally excludes a conviction by confession." But the court admitted the confession, saying (1 Dall. at 40):

> To prove the defendant's confession by two witnesses, is certainly not sufficient, under the statute, to convict him. But a confession after the fact, is a proof of the *fact itself;* and though not competent alone to supply the want of two witnesses, yet it is good by way of corroboration: and

> therefore, if an *overt* act has been proved in the county of Chester, by two witnesses, the evidence now offered will be proper, in confirmation of their testimony.

After conviction, counsel moved for a new trial on the ground "that the evidence given respecting his declarations, or confessions, was altogether illegal, and ought not to have been allowed." But after full argument, the motion was refused; "and the defendant, a short time afterwards, was accordingly executed." 1 Dall. at 40.[82]

The same rule was applied in *Respublica* v. *McCarty*, 2 Dall. 86, *supra*, where the opinion of the court and the charge of McKean, C. J., both discuss the St. 7 Will. III.

Similarly, at the first trial of *Fries*, *supra*, Peters, D. J., charged the jury that (9 Fed. Cas. at 909),

> The confession of the prisoner may be given in evidence as corroboratory proof of the intent, or quo animo. But, although proved by two witnesses, being made out of court, it is not of itself sufficient to convict. Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact.

---

[82] It seems significant that James Wilson, whose client was hanged under this view of confessions, did not urge the Constitutional Convention to change it, nor did he mention the point in the *Lectures on Law* which he delivered in 1790 and 1791. 3 *Works of James Wilson* (1804), 95–105, 172, 159–161.

We think the matter clear, both on principle and on precedent; there was no error in the trial judge's charge in this respect.[63]

B. *The evidence relative to Herbert's hostile mission was properly admitted.*—Petitioner also challenges (Pet. 38–41) the admissibility of Burger's testimony and the exhibits introduced in connection therewith concerning the mission of the saboteurs. He is mistaken in his contention that this evidence was admitted on the issue of trea-

[63] The following instructions bore on this point (R. 41–42; R. 36):

61. The court has also permitted the Government to introduce evidence of certain alleged admissions made by the defendant after he was in custody. You are instructed that such evidence may be considered by you solely on the issue of the intent or state of mind of the defendant in committing, if he did commit, any of the overt acts alleged in the indictment and submitted to your consideration in these instructions. In other words, any witness who may have testified to such alleged admissions is not a "witness" within the meaning of the Constitutional requirement of "two witnesses to the same overt act."

45. By the term "witnesses," used in this connection the Court does not mean persons who testify to admissions, if any, purportedly made by the defendant before the commencement of this trial. Neither admissions, if you believe any were made by the defendant, nor persons who took the stand to testify to such admissions, if any, are "witnesses" within the meaning of the foregoing provision of the Constitution, and neither such admissions, if any, nor any persons testifying to them, if any, can be considered by the jury as a substitute for the Constitutional requirement.

sonable intent.[64] The testimony and exhibits were admitted in evidence solely upon the issue of Herbert's enemy status (R. 136–138, 191), and the judge expressly instructed the jury that this evidence was limited to that issue (R. 42).[65] The evidence was thus an essential part of the case for

[64] Petitioner's argument in this respect (Pet. 38–39) is based on a statement in the majority opinion below, discussing the sufficiency of the overt acts charging purchase of the automobile (R. 905). Although, in any event, a statement in the opinion of the circuit court of appeals would not show error at the trial, it is clear that the majority opinion below discussed Burger's testimony, not on the issue of intent, but as a part of the setting in which the act of purchasing the automobile must be considered to determine whether it was an act of aid and comfort to the enemy.

[65] The judge's instruction was as follows (R. 42):

> 62. You are further instructed that the testimony of Ernest Peter Burger and the testimony of any other witness, if any, concerning alleged events which may have taken place in Germany and France at the time of Herbert Haupt's alleged stay in those countries, and the testimony, if any, of any witness concerning alleged events in Florida, and all exhibits in evidence which may have been identified by any witness who may have testified to any such events, and all testimony, if any, of witnesses concerning alleged acts of Herbert Haupt and alleged utterances and statements purportedly made by him, both prior to and during his stay in Chicago in 1942, and out of the presence of this defendant, and all articles purportedly taken from the person of Herbert Haupt while in Chicago in June, 1942, and admitted in evidence, have been admitted for the sole and limited purpose of determining whether the said Herbert Haupt was or was not an agent of the Government of the German Reich and an enemy of the United States as charged in the indictment, and you are to consider this evidence solely on this question.

the limited purpose for which it was received. The propriety of producing such evidence to show that Herbert was an enemy agent was recognized by petitioner's counsel in his opening statement (R. 101–102), and the evidence was received for this limited purpose without objection by petitioner (R. 136–138, 191).

It was, of course, an essential part of the Government's case to prove that Herbert was an enemy agent who was in this country for the purpose of performing a hostile mission. The nature of the mission was the setting in which, under the *Cramer* decision, the overt acts performed by petitioner had to be judged. And the character of the mission was a vital element in determining, not only petitioner's guilt, but the gravity of his offense in giving aid and comfort to the enemy.[66] In this case, there was not, as in the *Cramer* case, a concession of the enemy status of the saboteur at the time the aid was given; in fact, defense counsel indicated in his opening state-

[66] "His plea was not guilty, and he could not prevent the introduction of competent evidence to prove every element of the crime charged by admitting a part of them. The People were entitled to present to the jury all the facts, in order that they might have proper weight in determining criminal intention and what the verdict ought to be, as well as to decide whether the punishment should be by a fine, only, or by fine and imprisonment * * *." *People* v. *Munday*, 293 Ill. 191, 206, certiorari denied, 254 U. S. 638. See also *Abshier* v. *People*, 87 Colo. 507, 524–525; *State* v. *Griffin*, 218 Iowa 1301, 1311–1312.

ment that he intended to show that Herbert had abandoned the hostile mission (R. 102–103).

C. *The trial judge properly exercised his discretion to permit the prosecution to cross-examine a hostile witness.*—Petitioner's argument (Pet. 37) that it was improper to permit the Government to cross-examine Zermer as a hostile witness is totally without merit. As we have shown (*supra*, pp. 26–27), Zermer was a friend of petitioner's who had agreed to receive Herbert's mail for him, at petitioner's request, and who had also been asked by petitioner to furnish Herbert with lodging. At the previous trial of petitioner, Zermer gave highly incriminating testimony concerning petitioner's efforts to arrange for Herbert's lodging. Yet at the present trial he professed to have no such information (R. 335–337). It is well established that in such circumstances the trial judge has discretion to permit the prosecution to cross-examine its own witness. *Hickory* v. *United States*, 151 U. S. 303, 309; *Walker* v. *United States*, 104 F. 2d 465, 470 (C. C. A. 4); *United States* v. *Graham*, 102 F. 2d 436, 441–442 (C. C. A. 2), certiorari denied, 307 U. S. 643.

V. THE CLOSING ARGUMENTS OF GOVERNMENT COUNSEL INVOLVED NO MISCONDUCT AND WERE THOROUGHLY PROPER AND PROFESSIONAL

By reference to his brief in the court below (Pet. 47), petitioner attacks various statements

made by government counsel in their closing arguments to the jury. His contentions in this respect were apparently considered by the circuit court of appeals to be so completely devoid of merit as not to warrant discussion, despite the comprehensiveness of the opinion below in other respects.

Basically, petitioner objects to the references to evidence which was admitted on the question of intent (C. C. A. Br. 226–230, 231–233). But his objection there rests on the erroneous assumption that such evidence was incompetent. Since, as we have shown, *supra*, pp. 130–149, all of this evidence was admissible, it was obviously not improper for counsel to refer to it in summing up the case to the jury.

For the rest, we submit that the passages which petitioner quoted below (C. C. A. Br. 225–234) are not improper, even when considered on their face apart from their context, and that, when read in their proper place in the entire arguments (R. 742–772, 808–820), they are unassailable.

It was not improper to tell the jury that, after war had been declared, every German spy was an enemy of the United States, no matter what his relationship to a citizen of the United States, and that relationship did not excuse treason (R. 743; C. C. A. Br. 225).[67] Nor was it improper, in

[67] Compare *The Eliza*, 4 Dall. 37, 40, *per* Washington, J.: "* * * every contention by force, between two nations, in external matters, under the authority of their respective

placing the acts of treason in their setting, to refer to the fact, which had been established by proper evidence (e. g., of petitioner sending Herbert to the Bund camp, *supra*, pp. 28–29), that petitioner had instilled in Herbert a pro-Nazi philosophy (R. 748–749; C. C. A. Br. 226).[68]

The next passage which petitioner quotes occurred after eight pages of argument in the original transcript, when Government counsel was answering the contention originally advanced by the defense that Herbert had abandoned his mission when he went to live with his parents in Chicago (R. 753; C. C. A. Br. 226). Defense counsel's objection to the prosecutor's reference to Herbert's execution was immediately sustained by the court (R. 753), but neither the objection nor the ruling is referred to in petitioner's brief below.

---

governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war, all the members acts under a general authority, and all the rights and consequences of war attach to their condition."

[68] Compare *Knauer* v. *United States*, No. 510, Oct. T. 1945, decided June 10, 1946, p. 6 of slip opinion: "In the fall of 1936 he enrolled his young daughter in the Youth Movement of the Bund—a group organized to instill the Nazi ideology in the minds of children of German blood. They wore uniforms, used the Nazi salute, and were taught songs of allegiance to Hitler."

The only other statement objected to—government counsel's telling the jury that their verdict should not be based on sympathy but on the evidence (R. 771, 808; C. C. A. Br. 230–231)—was obviously not error.

A reading of the closing arguments as a whole shows that government counsel, though they argued their case thoroughly and persuasively, exercised proper professional restraint, and conducted themselves at all times in a thoroughly lawyer-like manner. The charge that they appealed to war hysteria and prejudice is, in our view, utterly without foundation.

VI. THERE WAS NO ERROR IN THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY

Petitioner's objections to the trial judge's charge to the jury (R. 28–43; Pet. 47–48, 58–88) are largely based on the contentions already discussed in earlier sections of this brief.

A. *The instructions given were correct.*—Instruction No. 26 (R. 33; Pet. 58–59) in which the judge summarized the indictment, including a statement of the overt acts later withdrawn, was not improper since the judge had previously instructed the jury that the indictment was not evidence (No. 14; R. 705), and later specifically cautioned the jury to consider only the submitted overt acts as possible acts of aid and comfort (Nos. 47–49; R. 36–39). Petitioner's argument that the summary of the withdrawn overt acts

was prejudicial is based on his erroneous contention (see pp. 137–144, *supra*) that testimony of the unsubmitted acts was irrelevant.

Instruction No. 36 (R. 34–35; Pet. 59–60), summarizing the elements of treason as they applied to this case, cannot be judged alone. It did not purport to be a complete definition of the offense, but was merely a portion of the judge's charge dealing generally with the concept of treason. Subsequently, the judge gave full instructions on the necessity of finding an overt act (Nos. 38–41, R. 35), and on the requirement of proof of that act by two direct witnesses (Nos. 42–49, R. 35–39); and he had earlier admonished the jury that they must consider his charge as a whole (No. 15, R. 31).

Instruction No. 41 (R. 35, Pet. 61), dealing with an overt act, may not fully comport with the definition of overt act laid down in the *Cramer* opinion, though when read together, as it must be, with Instruction No. 40 (R. 35), the difference is probably not substantial. But since the overt acts actually submitted to the jury were in fact acts of aid and comfort to the enemy, and since the jury was required to find that petitioner performed such acts, the erroneous characterization of the overt acts is of no moment. Moreover, petitioner's objection to this instruction is not based on the *Cramer* rule, but on the trial judge's refusal (R. 684–685) to change the words "perfectly innocent act" to "perfectly innocent ap-

pearing act." Petitioner was certainly not harmed by failure to make the change.

Instruction No. 49 (R. 39, Pet. 61–63), dealing with the withdrawn overt acts as evidence of intent, has already been discussed, pp. 137–144, *supra*, as have Instructions 50 and 51 (R. 39, Pet. 63–64), requiring the jury to find only one overt act proved by two direct witnesses. See pp. 98–129, *supra*.

Instructions Nos. 53 and 54 (R. 40, Pet. 64–73), discussing intent and distinguishing intent and motive, are, as we have shown, *supra*, pp. 53–57, in accord with established principles, recognized by this Court in the *Cramer* decision.

Instructions Nos. 55–58, and 60–61 (R. 40–42, Pet. 73–77) deal with the evidence to be considered on the issue of intent. For the reasons canvassed above, pp. 130–149, it is clear that these instructions correctly stated the law.

B. *The requested instructions were properly refused.*—Petitioner's requested instructions on the Illinois statute defining an accessory after the fact (Pet. 77–80) were, as we have already pointed out, *supra*, p. 57, clearly wrong. Apart from the circumstance that a state statute cannot vary the scope of a federal crime defined in the federal Constitution itself, the gravamen of the offense here is not that petitioner became an accessory after the fact to Herbert's offense by concealing a known criminal, but that; by

sheltering and harboring a known enemy agent, petitioner himself committed the crime of treason.

The requested instructions relating to intent (Pet. 77–78, 83–85), insofar as they did not embody petitioner's erroneous theory that a motive to aid his son precluded a treasonable intent, were covered in the judge's charge. The judge had also adequately charged the jury on the caution to be accorded the testimony of persons convicted of a felony (Pet. 80–82; see No. 13, R. 30), and on the presumption of innocence, burden of proof and reasonable doubt (Pet. 82–83; see Nos. 6–9, R. 29–30). Cf. *Agnew* v. *United States*, 165 U. S. 36, 51; *Bennet* v. *United States*, 227 U. S. 333, 339; *United States* v. *Trenton Potteries*, 273 U. S. 392, 396.

Before leaving the subject of the trial judge's instructions to the jury, it seems appropriate to call attention to the painstaking care with which they were framed. The judge held long conferences in chambers with counsel for the parties, and discussed three drafts with them—his own (R. 703–715), the Government's (R. 716–725), and the defendant's (R. 725–738). These discussions are set out in full in the record (R. 669–703, 732–742, 773–775). In those circumstances, a further request on petitioner's part for a modification of the instructions, made some five hours after the jury had retired (R. 823), was denied, the judge saying (R. 824), "Never in the thirteen

years that I have been here have I given counsel the opportunity to make suggestions and objections to instructions that I have given them in this case."

We doubt whether there are many records on the files of this Court that show in such complete detail the reasons that led to the choice of the instructions finally given, or which show the meticulous attention to a proper charge which this case reflects.

VII. NO ERROR OCCURRED IN CONNECTION WITH THE DELIBERATIONS OF THE JURY

A. *It was proper to send the indictment and charge to the jury room.*—The trial judge permitted the jury to take a copy of the indictment, which the jury was told was not evidence (No. 14, R. 31), and a copy of the charge with them into the jury room. The judge clipped to the indictment a statement of the overt acts withdrawn and submitted (R. 44, 773–774). Petitioner urges (Pet. 49–50) that this was error. It is settled, however, that such matters are within the discretion of the trial judge. *Little* v. *United States*, 73 F. 2d 861, 864 (C. C. A. 10); *Capriola* v. *United States*, 61 F. 2d 5, 7 (C. C. A. 7); *Murray* v. *United States*, 130 F. 2d 442, 444 (App. D. C.); *Garst* v. *United States*, 180 Fed. 339, 345 (C. C. A. 4).[*] Where, as here, there are involved

[*] In the *Stephan* case, it was held not error to read the indictment to the jury. 133 F. (2d) at 99.

twelve overt acts which the jury was required to pass upon, and a lengthy charge, we think it is clear that there was no abuse of that discretion.[70]

B. *It was proper to read the testimony of three witnesses to the jury at its request.*—On the morning after the jury retired, they advised the court, through their foreman, that they desired that the testimony of defense witness Short and government witnesses Hirsch and Robe be read to them.[71]

---

[70] See the following colloquy which took place in chambers (R. 675):

> Mr. Bertram. * * * I will make this objection or comment to the instruction which later on states, "That the indictment is to be given to the Jury, so that they may take it into the jury room." We believe it is unnecessary, and also it is unfavorable to the defendant, and prejudicial to him for the court to repeat the charges of the indictment as part of the charge to the Jury.
>
> The Court. Oh, my dear man! How are you going to tell the Jury what the charge against the man is? How in the world can you tell these fourteen people what this man is being tried for? * * * I don't know how to instruct the Jury what the charges against him are, otherwise, than substantially in the words of the indictment, and I have already told them clearly the story as I can, that the indictment is not evidence or the fact he was indicted is not to be considered as evidence.

[71] Short had testified that he was a lawyer of over fifty years' standing at the bar; that he, accompanied by petitioner's present counsel, interviewed petitioner at the Cook County Jail on July 29, 1942; that from that interview he concluded that petitioner was insane; but that he filed no petition in any court asking for an adjudication of petitioner's sanity (R. 639–644). A sanity hearing was in fact

The trial judge thereupon summoned counsel on both sides to discuss with them the propriety of granting the jury's request. Petitioner's counsel opposed granting the request, and government counsel expressed concern over granting the request unless petitioner's counsel concurred in the action. The trial judge finally concluded that fairness to the jury required that its request be granted and that a cautionary instruction would adequately protect both sides (R. 825–830). He said (R. 826, 827):

> * * * It is a question, really, in fairness to these people that have given almost three weeks of their time to try this case. They make what to anybody on the street would seem to be a reasonable request. That is the way I feel about it. I do think if it is read to them they should be cautioned, we should say to them now, you must bear in mind that you are hearing this testimony for the second time, at your request. You are hearing it for the second time, you should exercise caution to see that you do not give it more weight than the testimony of other witnesses. Bear in mind that you are hearing it the second time, and consider it just as though you heard the witnesses, together with all other

---

held before petitioner was tried on the treason charge, and he was found sane (R. 13–15; cf. R. 863–869).

Hirsch and Robe were the F. B. I. agents who had testified concerning the admissions petitioner had made to them on August 5, 1942 (see pp. 22–25, *supra*).

testimony. With that instruction, I can't see any reason in the world why they should not hear the evidence if you want to have a fair trial. * * *

* * * We must assume here are twelve people trying to do their duty to the very best of their ability and they make, what seems to be a reasonable request and to anybody that wasn't a lawyer, that would seem a most reasonable request, and merely because we are lawyers why should it seem unreasonable. I don't see it. * * *

Accordingly, the jury returned to the courtroom, the testimony of the three witnesses was read to them (R. 830–845), and the court then instructed the jury as follows (R. 845):

> Ladies and gentlemen, pursuant to the written request of the jury through your foreman there has been read to you a transcript of the testimony of the witnesses, Short, Hirsch, and Robe. The jury are cautioned to bear in mind that they have now heard the testimony of these three witnesses twice while they have heard the testimony of the other witnesses only once, and that they shall not allow the fact that they have heard the testimony of these three witnesses twice to cause them to give undue importance or weight to it. The jury should, on the other hand, consider the testimony of these three witnesses, and that of each of them, as though they had heard it but once and consider it together with all of the other evidence in the case.

Although the practice of reading portions of the testimony of the jury at their request is not an uncommon one in the federal courts, its propriety seems not to have been made the subject of appellate decision either in civil or criminal trials.[72] We think it is clearly a matter for the discretion of the trial judge, and, in this case, considering the length and complexity of the trial, the fact that the jury's request related to testimony on both sides of the case, and that the judge cautioned the jury not to give undue emphasis to the re-read testimony, no abuse of discretion was shown. The practice here followed has been approved in numerous state cases, *Garcia* v. *State*, 26 Ariz. 597, 601; *Lutins* v. *State*, 142 Fla. 288, 289; *Green* v. *State*, 122 Ga. 169, 170–171; *State* v. *Jester*, 46 Idaho 561, 573; *State* v. *Logue*, 115 Kan. 391, 393; *People* v. *Kasem*, 230 Mich. 278, 288; *Duffey* v. *State*, 124 Neb. 23, 26; *State* v. *Jennings*, 131 Ore. 455, 475, 476; *Moore* v. *State*, 131 Tex. Crim. 420, 424; *Willard* v. *State*, 195 Wis. 170, 174.

C. *The jury's deliberations were not of undue length.*—There is no merit in petitioner's contention (Pet. 50–51) that the mere fact that the jury deliberated for approximately 28 hours constitutes reversible error. At the time when the jury sent in its request for the rereading of

[72] The practice has been upheld by a district court. *United States* v. *Hammond*, 226 Fed. 849, 854–855 (N. D. Cal.), reversed on other grounds, 246 Fed. 40 (C. C. A. 9).

testimony, counsel for the defense called the judge's attention to the fact that the jury had been out about 24 hours, and the judge stated that the jury appeared to be in good condition (R. 829). Convictions returned after deliberations for as long or longer periods of time than the time here involved have been sustained. *Hyde* v. *United States*, 225 U. S. 347, 383 (three days and three nights); *Culp* v. *United States*, 131 F. 2d 93, 101 (C. C. A. 8), (one day); *Bochm* v. *United States*, 123 F. 2d 791, 812 (C. C. A. 8), certiorari denied, 315 U. S. 800 (26 hours); *Mendelson* v. *United States*, 58 F. 2d 532, 535 (App. D. C.) (one day and a half); *Bernal* v. *United States*, 241 Fed. 339, 342 (C. C. A. 5), certiorari denied, 245 U. S. 672 (almost two days).

D. *The jury's plea for clemency shows that its verdict did not rest on war-time passion.*—Petitioner's contention (Pet. 54–55) that the verdict of the jury was the result of passion, prejudice, and war hysteria is answered by the record. After the verdict was reached, the jury indulged in the unusual practice of writing a letter to the trial judge, signed by all the jurors (R. 45, 847), which reflects their mental attitude toward petitioner. This letter says:

> Realizing fully that our function terminates with the rendering of our verdict, we, the jury, are moved humbly to beseech your Honor's consideration in dealing mercifully with this defendant.

> In conformity with your Honor's instructions, neither pity nor sympathy has entered into our deliberations. In this plea, we express only what is in our hearts.

The trial judge was so impressed with this letter that, although his own considered view was that petitioner should be sentenced to death (see R. 53–55),[78] "In deference to the request of these men and women, whose judgment may be better than mine, the sentence will be life imprisonment and, because the statute requires it, a fine of $10,000." (R. 55).

Apart from the circumstance that, as the trial judge noted (R. 54), the verdict "was fully justified by the evidence", and "No other verdict than that rendered was reasonably possible" (R. 54), it certainly cannot reasonably be said that a jury which voluntarily pleaded for mercy for petitioner based its verdict on such extraneous matters as war hysteria, passion, or prejudice.

---

[78] "The court does not believe that Hans Max Haupt can be reformed. He is and always will be a Nazi.

"The court does not believe that it need by punishment try to prevent Hans Max Haupt from committing treason again. While the court believes that the defendant's mental faculties are unimpaired, his spirit is broken and he is not likely to commit treason again.

"What punishment is necessary to be imposed in order to deter other like-minded persons from committing like crimes? My conscience tells me that there is but one answer to that question and that answer is—Death. * * *" (R. 54).

CONCLUSION

Petitioner was convicted of treason after a sober, careful, and eminently fair trial, on the basis of evidence clearly establishing by the required two witnesses a number of legally sufficient overt acts of aid and comfort to the enemy, and clearly showing intent to betray. Reversal of the judgment below can be supported only by artificial refinements and technicalities which find no support in the treason clause of the Constitution. We therefore respectfully submit that the judgment below should be affirmed.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
BEATRICE ROSENBERG,
Attorneys.

NOVEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946